No. 14-623

Title: CPV Maryland, LLC, Petitioner
v.
Talen Energy Marketing, LLC, fka PPL EnergyPlus, LLC, et al.

Docketed: November 28, 2014

Linked with 14A282

Lower Ct: United States Court of Appeals for the Fourth Circuit

Case Nos.: (13-2419, 13-2424)

Decision Date: June 2, 2014

Rehearing Denied: June 30, 2014

Questions Presented

--Date--	------Proceedings and Orders----------
Sep 12 2014	Application (14A282) to extend the time to file a petition for a writ of certiorari from September 28, 2014 to November 27, 2014, submitted to The Chief Justice.
Sep 15 2014	Application (14A282) granted by The Chief Justice extending the time to file until November 27, 2014.
Nov 26 2014	Petition for a writ of certiorari filed. (Response due December 29, 2014)
Dec 11 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners Nazarian, et al.
Dec 12 2014	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for petitioner CPV Maryland, LLC. VIDED
Dec 17 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Dec 22 2014	Order extending time to file response to petition to and including February 11, 2015.
Dec 24 2014	Brief amicus curiae of National Association of Regulatory Utility Commissioners filed. VIDED.
Dec 26 2014	Brief amici curiae of The States of Connecticut, et al. filed. VIDED.
Dec 29 2014	Brief amici curiae of American Public Power Association, et al. filed. VIDED.
Feb 11 2015	Brief of respondents PPL EnergyPlus, LLC, et al. in opposition filed. VIDED.
Feb 24 2015	Reply of petitioner CPV Maryland, LLC filed.
Feb 25 2015	DISTRIBUTED for Conference of March 20, 2015.
Mar 23 2015	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Sep 16 2015	Brief amicus curiae of United States filed. VIDED.
Sep 29 2015	Supplemental brief of petitioner CPV Maryland, LLC filed.
Sep 30 2015	DISTRIBUTED for Conference of October 16, 2015.
Oct 19 2015	Petition GRANTED The petition for a writ of certiorari in No. 14-614 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Nov 9 2015	The time to file the joint appendix and petitioners' briefs on the merits is extended to

	and including December 8, 2015. VIDED
Nov 9 2015	The time to file respondents' brief on the merits is extended to and including January 12, 2016. VIDED
Nov 12 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Nov 16 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for all respondents. VIDED
Dec 8 2015	Joint appendix filed (2 volumes.) (Statement of costs filed.) VIDED.
Dec 8 2015	Brief of petitioner CPV Maryland, LLC filed. VIDED.
Dec 15 2015	Brief amicus curiae of National Association of Regulatory Utility Commissioners filed. VIDED.
Dec 15 2015	Brief amici curiae of The States of Connecticut, et al. filed. VIDED.
Dec 15 2015	Brief amici curiae of American Public Power Association, et al. filed. VIDED.
Dec 15 2015	Brief amicus curiae of NRG Energy, Inc. filed. VIDED.
Dec 15 2015	Brief amicus curiae of Public Utility Law Project of New York, Inc. filed. VIDED.
Dec 15 2015	Brief amicus curiae of The American Wind Energy Association filed. VIDED.
Dec 15 2015	Brief amici curiae of National Governors Association, et al. filed. VIDED.
Dec 15 2015	Brief amici curiae of Public Service Commission of the State of New York, et al. filed. VIDED.
Dec 15 2015	Brief amicus curiae of Public Citizen, Inc. filed. VIDED.
Dec 23 2015	SET FOR ARGUMENT ON Wednesday, February 24, 2016
Jan 12 2016	Brief of respondents Talen Energy Marketing, LLC, fka PPL EnergyPlus, LLC, et al. filed. VIDED.
Jan 14 2016	Joint motion for divided argument filed by petitioners. VIDED.
Jan 15 2016	CIRCULATED.
Jan 19 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Jan 19 2016	Brief amicus curiae of United States filed. VIDED. (Distributed)
Jan 19 2016	Brief amici curiae of Leading Economists filed. VIDED. (Distributed)
Jan 19 2016	Brief amicus curiae of American Electric Power Company, Inc. filed. VIDED. (Distributed)
Jan 19 2016	Brief amicus curiae of Allco Renewable Energy Limited filed. VIDED. (Distributed)
Jan 19 2016	Brief amici curiae of Electric Power Suppy Association, et al. filed. VIDED. (Distributed)
Jan 19 2016	Brief amicus curiae of Monitoring Analytics, LLC, Acting in its Capacity as Independent Market Monitor for PJM filed. VIDED. (Distributed)
Jan 25 2016	Joint motion for divided argument filed by petitioners GRANTED. VIDED
Jan 25 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. VIDED
Feb 4 2016	Supplemental brief of respondents Talen Energy Marketing, LLC, fka PPL EnergyPlus, LLC, et al. filed. VIDED. (Distributed)
Feb 11 2016	Reply of petitioners in 14-614 filed. VIDED. (Distributed).
Feb 11 2016	Reply of petitioner CPV Maryland, LLC filed. VIDED. (Distributed)
Feb 24 2016	Argued. For petitioners in 14-614: Scott H. Strauss, Washington, D. C. For petitioner in 14-623: Clifton S. Elgarten, Washington, D. C. For respondents: Paul D. Clement, Washington, D. C.; and Ann O'Connell, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) VIDED
Apr 19 2016	Adjudged to be AFFIRMED. Ginsburg, J., delivered the opinion of the Court, in which

Roberts, C. J., and Kennedy, Breyer, Alito, Sotomayor, and Kagan, JJ., joined. Sotomayor, J., filed a concurring opinion. Thomas, J., filed an opinion concurring in part and concurring in the judgment. VIDED

May 23 2016 JUDGMENT ISSUED

14-623

No. 14-___

Supreme Court, U.S.
FILED
NOV 24 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CPV MARYLAND, LLC,

Petitioner,

v.

PPL ENERGYPLUS, LLC, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Federal Power Act, 16 U.S.C. §§824 *et seq.*, States retain authority over electricity and capacity purchases by local utilities. They cannot, however, impose the rates for those purchases; only the Federal Energy Regulatory Commission (FERC) can regulate interstate wholesale rates. Seeking a new power plant, Maryland conducted a competitive procurement and directed its local utilities to enter into long-term contracts with the successful bidder, providing the stable revenue needed to induce the developer's investment and support the costs of construction. Under those contracts, if the developer's accepted bid price exceeds what the developer earns by selling the plant's capacity in the FERC-supervised auction, the utility pays the difference to the developer; if auction revenue exceeds the bid price, the developer rebates the difference to the utility. The payment or rebate is passed on to retail ratepayers.

1. Where, as a result of a state-directed procurement, the contract price to build and operate a power plant is the developer's bid price, and may result in payments beyond what the developer earns selling the plant's capacity in the FERC-supervised auction, is the program "field preempted" as a State's attempt to set interstate wholesale rates?

2. Is a state-directed contract to support construction of a power plant "conflict preempted" because its long-term pricing structure provides incentives different from the incentives provided by prices generated in the FERC-supervised yearly capacity auction?

PARTIES TO THE PROCEEDINGS

Petitioner in this Court is CPV Maryland, LLC (CPV), Intervenor-Appellant below and Intervenor-Defendant in the district court. The Chairman and Commissioners of the Maryland Public Service Commission (Commission) were sued in their official capacities and were Defendants-Appellants below. Harold Williams, Lawrence Brenner, and Kelly Speakes-Backman were named Defendants-Appellants below and remain Commissioners. W. Kevin Hughes was also a named Defendant-Appellant below as a Commissioner; he is now Chairman. Douglas R.M. Nazarian was also a named Defendant-Appellant below as Chairman; he is no longer a member of the Commission. Anne E. Hoskins, who was not a member of the Commission at the time this litigation commenced, is now a Commissioner.

Respondents, Plaintiffs-Appellees in the court below, are: PPL EnergyPlus, LLC, PPL Brunner Island, LLC, PPL Holtwood, LLC; PPL Martins Creek, LLC, PPL Montour, LLC, PPL Susquehanna, LLC, Lower Mount Bethel Energy, LLC, PPL New Jersey Solar, LLC, PPL New Jersey Biogas, LLC, PPL Renewable Energy, LLC, PSEG Power, LLC, and Essential Power, LLC.

RULE 29.6 STATEMENT

Petitioner CPV Maryland, LLC does not issue stock and so no publicly held company owns 10% or more of any stock.

CPV Maryland, LLC is 25% owned by wholly-owned subsidiaries of Competitive Power Ventures Holdings, LLC (CPV Holdings). The ownership structure, including affiliates, is: CPV Maryland, LLC is 25% owned by CPV Maryland Holding Company, LLC. CPV Maryland Holding Company, LLC is wholly owned by CPV Maryland Holding Company II, LLC. CPV Maryland Holding Company II, LLC is 99% owned by CPV Power Development, Inc. and 1% owned by CPV Maryland Investment, LLC. CPV Maryland Investment, LLC is wholly owned by CPV Power Development, Inc. CPV Power Development, Inc. is wholly owned by CPV Holdings. CPV Holdings is 88.55% owned by Warburg Pincus Private Equity IX, L.P.

CPV Maryland, LLC is also 50% owned by wholly owned subsidiaries of the Marubeni Corporation. The ownership structure, including affiliates, is as follows: CPV Maryland, LLC is 50% owned by MC St. Charles LLC. MC St Charles LLC is wholly owned by Marubeni Power America, Inc. Marubeni Power America, Inc. is wholly owned by AXIA Power Holdings B.V. AXIA Power Holdings B.V. is wholly owned by the Marubeni Corporation.

CPV Maryland, LLC is also 25% owned by wholly owned subsidiaries of the Toyota Tsusho Corporation. The ownership structure, including affiliates, is as follows: CPV Maryland, LLC is 25% owned by Toyota Tsusho St. Charles, LLC. Toyota Tsusho St. Charles, LLC is wholly owned by Toyota Tsusho Power USA, Inc. Toyota Tsusho Power USA, Inc. is wholly owned by the Toyota Tsusho Corporation.

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PETITION FOR A WRIT OF CERTIORARI

CPV Maryland, LLC (CPV) respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 753 F.3d 467 (4th Cir. 2014) and reprinted at App.1a. The Fourth Circuit order denying rehearing is reprinted at App.30a. The district court's opinion is reported at 974 F. Supp. 2d 790 (D. Md. 2013) and reprinted at App.34a.

JURISDICTION

This case was filed in the district court under 28 U.S.C. §1331, raising constitutional challenges to Maryland's program supporting construction of a new power plant. The district court issued final judgment on October 24, 2013. That judgment was appealed pursuant to 28 U.S.C. §1291. The Fourth Circuit affirmed on June 2, 2014. Timely motions for rehearing and rehearing en banc were denied. On September 15, 2014, the Chief Justice granted an extension of time to and including November 27, 2014 to file this Petition. This Petition is being filed within the time allowed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause is set forth at App.165a. Relevant provisions of the Federal Power Act are reprinted beginning at App.166a.

INTRODUCTION AND SUMMARY

The Fourth Circuit's decision holding that the Federal Power Act (FPA) of 1935, 16 U.S.C. §§824 *et seq.*, preempts Maryland's directed procurement of a power plant needed by that State misconceives, and crucially alters, the division of state and federal responsibility under the FPA. It directly undermines the States' ability to direct and supervise electricity and capacity purchases by local utilities, and thus to meet their citizens' long-term electricity needs through traditional means: long-term ratepayer commitments to power plant developers that provide the reliable revenue stream needed to support the capital investment required to build a power plant.

Given the enormous up-front investment required to build a power plant, those commitments are critical. In 2013, less than 3% of new power plant construction proceeded without revenue-stabilizing, long-term commitments to power plant developers in place. Those commitments are typically in the form of long-term contracts between the developer and local utilities, or reflect construction by vertically-integrated utilities that both generate electricity and sell to consumers, with the assurance that they will recover their costs through retail rates.

Under the FPA, States have sole authority to regulate and directly support power plant construction, and to pass the construction costs on to retail customers. The Federal Energy Regulatory Commission (FERC) is expressly denied authority over power plant construction (or retirement). Therefore, the vitality of the Nation's energy infrastructure ultimately depends on targeted *state* support for new power plants, most usually—until this and the

similar Third Circuit case that followed it said no[1]—through long-term contracts providing the revenue stream necessary for power plant development. The Fourth Circuit's decision undermines the States' ability to support that infrastructure development.

Maryland needed a new natural gas electric power plant to be built in a particular region. It determined that in the current "economic climate," existing markets had not attracted the necessary investment capital to build the plant. Maryland then conducted a procurement, offering the successful bidder long-term contracts with the State's local utilities, providing the stable revenue needed to support power plant construction.

To induce the bids and the capital investment of nearly three-quarters of a billion dollars needed to build a new power plant, the Maryland Public Service Commission (MPSC) offered the successful bidder a financial arrangement called a "contract for differences." Under these contracts, the bidder agreed to develop and operate the plant, selling its capacity in the federally-supervised interstate auction, according to the rules of the auction. The local utilities would pay the developer the *difference* between the developer's auction sales revenue and its bid price to build and operate the plant. If the developer's auction sales revenue exceeded the bid price, the developer would rebate the difference to the utilities. The local utilities would, in turn, recover their costs from (or rebate surpluses to) their retail customers.

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[1] *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014). Separate petitions for certiorari are being filed addressing that case, which raises the same issue.

Maryland's program is an exercise of traditional powers. To ensure reliable electricity supply, Maryland directed local electric utilities to enter into long-term contracts at prices set by competitive procurement. It promised the utilities that they would recover their costs from retail customers. It did all this to spur construction of needed generation resources available to the State.

In barring Maryland's program based on "field preemption," the Fourth Circuit misconstrued the FPA in two ways: by equating a developer's price bid in a competitive procurement with a price "set" by the State, and by deeming a supplemental payment to be a rate subject to FERC review in the first place.

The FPA assigns FERC authority over interstate wholesale sales of electricity and interstate transmission. Congress expressly preserved state authority over electric generation, intrastate transmission, and electric sales and rates other than wholesale sales. States retain broad authority over local utilities. States have long exercised their authority over local "utility buy-side" decisions to support power plant development, directing their utilities to buy power (or approving proposals to buy power) through long-term contracts that ensure reliable, economical electricity for their citizens.

Until the decision below—and the Third Circuit decision that followed it—not only the existence of state authority to direct such long-term contracts, but the *limits* of the States' authority to direct their utilities to enter into contracts, were clearly demarcated and well understood. States could mandate and oversee competitive procurements for local utilities, and direct them to enter into contracts at market prices established by those procurements.

What States could *not* do was *set* the price at which utilities buy, or developers sell, energy or capacity. State price-setting would usurp FERC's exclusive authority.[2] The Fourth Circuit's field preemption theory improperly equates a competitive price, offered by a developer, with a price impermissibly imposed by the State. It thereby nullifies the States' power to direct local utilities to enter into contracts that meet their citizens' needs.

As shown below, the supplemental payments under the contracts for differences at issue were actually not rates subject to FERC's jurisdiction at all because they did not govern a sale of capacity or electricity. But even if one were to accept the premise that they were subject to FERC jurisdiction, that would not mean preemption. It would simply invite FERC's review of those rates at FERC's initiative or at the behest of anyone complaining about them. Rates or contracts subject to FERC's review cannot usurp FERC's jurisdiction. Indeed, by judicially declaring the contracts invalid, nominally to protect FERC's authority, the Fourth Circuit's decision paradoxically prevented FERC from exercising any authority it might have to review those contracts. What Maryland did not do is *set* a wholesale rate at which energy or capacity is purchased. If the purchase price is not imposed by the State, but by the market, as a developer's competitive offer, it does not usurp FERC's rate-review authority, and is not "field preempted." The Fourth Circuit's contrary field preemption ruling

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[2] See *Cal. Pub. Utils. Comm'n*, 132 FERC ¶61,047, P 69 (2010), *clarified*, 133 FERC ¶61,059 (2010), *reh'g denied*, 134 FERC ¶61,044 (2011).

misses this basic point, eviscerating boundaries within which States and FERC have operated for decades.

The Fourth Circuit's conflict preemption holding is arguably even broader and equally wrong. FERC determined that state-supported generators that complied with FERC's revised rules could sell capacity in the FERC-supervised auction without harming the auction, notwithstanding any "subsidy." Moreover, FERC explained that its auction rule changes were not intended to interfere with state support for new capacity.[3] Thus, there was no basis to find actual conflict between federal and state law.

Instead, the Fourth Circuit posited a policy-minded conflict, holding that by providing incentives for power plant development, Maryland "disrupted" incentives provided by the FERC-supervised auction's "price signals." But FERC's auction rules and auction prices do not apply outside the auction. There is no evidence that Congress or FERC intended auction rates and rules to be the *only* source of incentives to invest in new power plants, and it is unlikely that they would do so, displacing States from their primary role in developing the Nation's energy infrastructure.

Because prices affect investment, FERC has a limited role in stimulating investment as an "incident" to its market and rate supervision.[4] But markets are imperfect. States look farther into the future than a three year forward auction. They can support fuel source diversity for environmental or reliability

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[3] See *PJM Interconnection, L.L.C.*, 137 FERC ¶61,145, P 89 (2011), *aff'd, N.J. Bd. Of Pub. Utils. v. FERC*, 744 F.3d 74, 95 (3d Cir. 2014) (*"NJBPU"*).

[4] See *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 484 (D.C. Cir. 2009) (*"CDPUC"*).

reasons—to which markets may be indifferent. They have offered developers long-term support for electricity infrastructure development when investment capital is not otherwise forthcoming.[5] That authority necessarily resides with States because FERC itself cannot sponsor new power plants. Government-directed procurements like Maryland's spur investment when markets are not otherwise attracting needed investment capital.

The Fourth Circuit's rulings equating a procurement with a rate set by the State, and questioning the States' authority to incentivize power plant construction, undermine a tool widely used by States to stimulate construction and other energy initiatives. Directions to local utilities to buy electricity or capacity stimulate power plant construction and support other energy initiatives. All such contracts "set rates," and provide incentives different from auction incentives. The particular mechanism used here is especially useful. New Jersey used a nearly identical approach to support three power plants needed by that State.[6] That approach is well-suited to its purpose. A "guarantee" measured by the difference between what the developer bids to build a plant, and what it earns selling its capacity, effectively limits ratepayer contributions to the project.

A quarter century ago, the Court directed courts considering "field preemption" under the FPA's sister statute to "take seriously the lines Congress drew in

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[5] The Fourth Circuit's backup theory, that 20-year contracts conflict with the three year lock-in for auction prices, is equally ill-conceived. FERC's auction purchase rules do not set policy outside the auction. See *infra* at 31-32.

[6] See *Solomon*, 766 F.3d at 248-49.

creating a dual regulatory system," and avoid "extravagant" interpretations of federal energy regulatory jurisdiction at the States' expense. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 512-13 (1989). The Court also admonished that the inevitable interaction between state and federal initiatives should not be mistaken for preemptive conflict. *Id.* at 517-18. The Fourth Circuit's decision ignored the Court's directions. The Court should grant certiorari to address the important questions presented and restore the States' power to support needed energy infrastructure development.

STATEMENT

A. The FPA Preserves the States' Power To Support Power Plant Construction

The "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). The FPA preserves each State's authority to ensure reliable electricity supply for its citizens by supporting power plant construction, transmission line approval, or through development of new technologies. It also preserves the States' authority to set retail rates to support those initiatives.

With the FPA, 16 U.S.C. §§824 *et seq.*, Congress vested exclusive regulatory authority over the "sale of electric energy at wholesale in interstate commerce" in what eventually became FERC. 16 U.S.C. §824(a), (b)(1). FERC also has authority over practices "affecting," or "in connection with," rates. 16 U.S.C. §§824d, 824e. But FERC's authority extends "only" to matters "not subject to regulation by the States." *Id.*

§824(a). Moreover, FERC "shall not have jurisdiction, except as specifically provided . . . , over facilities used for the generation of electric energy." 16 U.S.C. §824(b)(1).

While the federal role has changed over time, 'States retain significant control over local matters," including "utility generation and resource portfolios" and "utility buy-side . . . decisions," *i.e.*, where the utility purchases power to meet its needs rather than construct its own facilities. *New York v. FERC*, 535 U.S. 1, 24 (2002). In 2005, when Congress expanded FERC jurisdiction over transmission and reliability standards, see 16 U.S.C. §§824o *et seq.*, it again denied FERC the authority "to order the construction of additional generation . . . capacity," 16 U.S.C. §824o(i)(2), confirming that "[n]othing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State . . . ." *Id.* §824o(i)(3).

State support for power plant construction through supervision of local utilities and state-approved charges on retail ratepayers is, of course, nothing new. Under the classic regulatory model, with vertically-integrated utilities which both generate electricity and sell electricity to retail ratepayers, States ensured needed new power plant construction by allowing local utilities to recover prudently incurred costs from retail ratepayers. Many States continue to have vertically-integrated utilities. Others, like Maryland, have partially restructured their electric power sector by requiring their local utilities to buy some or all of their generation requirements from the interstate markets, again with the costs of those purchases borne ultimately by retail ratepayers.

Even in restructured states, state regulators retain regulatory control over purchasing decisions by their local utilities, and the rates they charge their customers. States use that authority to direct those utilities to enter into long-term contracts to purchase power (or to approve such contracts). Those contracts assure reliable electricity supplies for state citizens. And they assure developers of the long-term revenue stream needed to finance projects costing hundreds of millions of dollars.

Almost all (more than 97%) of new power plant construction rests on long-term commitments, underwritten by ratepayers. Those commitments typically take the form of long-term contracts between the developer and the regulated local utility (64%), or construction by the local utility that owns the power plant and sells to retail consumers (29.6%). Only 2.4% of recent new generation capacity was built "on spec," *i.e.*, relying solely on short-term open market sales.[7]

State authority to direct local utilities to buy power or capacity from prospective developers poses no conflict with federal law or policy. See 18 C.F.R. §35.27 (recognizing States' authority to "establish . . . [c]ompetitive procedures for the acquisition of electric energy . . . purchased at wholesale"). This includes the authority to "dictate the generation resources from which utilities may procure electric energy." *Cal. Pub.*

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[7] These figures are for 2013. See American Public Power Association, *Power Plants Are Not Built on Spec—2014 Update* at 1-2 and Table 1 (2014) (*"2014 APPA Study"*), http://goo.gl/t62QuS. Similar figures are available for 2011. See American Public Power Association, *Power Plants Are Not Built on Spec: An Analysis of New Electric Generation Projects Constructed in 2011* at 5-6 and Table 2 (2012) (*"2012 APPA Study"*), http://goo.gl/WCboHw.

Utils. Comm'n, 134 FERC ¶61,044, P 30 & n.62 (2011). If the resulting contracts are subject to FERC jurisdiction, FERC may review them.

What States may *not* do is *set* the price (rather than have the price set competitively) at which electricity or capacity is sold at wholesale. Only FERC can determine whether prices subject to its jurisdiction are just and reasonable. Compare *Midwest Power Sys., Inc.*, 78 FERC ¶61,067, 61,248 (1997); *Cal. Pub. Utils. Comm'n*, 132 FERC ¶61,047, P 69 (2010) (California statute "preempted to the extent that the [State] is setting wholesale rates"), with *Doswell Ltd. P'ship*, 50 FERC ¶61,251, 61,756-57 (1990) (approving state-certified agreement, with prices set by competition); *Commonwealth Atl. Ltd. P'ship*, 51 FERC ¶61,368 (1990).

B. Maryland's Initiative Supported Necessary Power Plant Construction

In April 2012, the Maryland Public Service Commission (MPSC) determined that "long-term demand for electricity . . . compels us to order new generation in the amount of 650 to 700 MWs . . . in Maryland by 2015." Order No. 84815, No. 9214 at 29 (MPSC Apr. 12, 2012). It explained that market forces had not "provided sufficient certainty for prospective generation suppliers to secure financing in the current economic climate." *Id.* at 22.

It offered the successful bidder, agreeing to build the plant in the desired locale, contracts with Maryland's local utilities. CPV offered a plant with the required capacity and technology and was selected as providing "the best price." The 20-year contracts were in the form of contracts for differences, a hedge. The party that would ordinarily bear the risk of yearly price

fluctuations in capacity revenue (*i.e.*, the developer) trades that variable revenue for a defined revenue stream, at its offer price. The counterparty – a local utility – takes on the risk of fluctuating prices. The Fourth Circuit deemed these contracts a "guarantee[]" or "subsidy." App.18a, 23a.

CPV thus agreed to build a power plant of specified capacity in Maryland's desired locale, using designated natural gas technology, and to sell its capacity in the federally-supervised capacity auction.[8] In consideration, CPV would receive its offer price, over 20 years. If CPV's revenues were below the contract price, Maryland's local utilities would pay CPV the difference, and pass any cost on to their ratepayers. If CPV realized sales revenues above its yearly contract price, CPV would rebate the difference to local utilities, which would pass the savings on to the retail ratepayers.

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[8] As a definitional matter, "capacity" is used in two related ways. Capacity is the quantity of electricity that a given resource can produce or make available. But because electricity demand fluctuates (and electricity cannot be stored), the ability to provide electricity on demand is itself sold in interstate markets. As the D.C. Circuit explained:

> "Capacity" is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties—generally, generators—who can either produce more or consume less when required. The penultimate and most proximate buyers of capacity (before the consumers who ultimately shoulder the costs in their utility bills) are . . . the public utilities that deliver electricity to end users.

See *CDPUC*, 569 F.3d at 479.

C. FERC Can Influence Power Plant Development Only Indirectly Through Its Market and Rate Supervision

Under the FPA, FERC regulates interstate wholesale energy markets and has exclusive authority to determine whether rates are "just and reasonable." 16 U.S.C. §824d(a). FERC may also choose to regulate other matters "affecting" or "in connection with" rates. 16 U.S.C. §§824d, 824e. FERC has encouraged formation of "regional transmission organizations," which coordinate generators, transmission resources and wholesale purchasers. PJM Interconnection, L.L.C. (PJM), spanning most of thirteen states, including Maryland, is the largest of these entities.

Capacity is frequently bought and sold through bilateral contracts. See *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 171 (2010) ("The [FPA] allows . . . sellers and buyers [to] agree on rates by contract.").[9] Non-auction sales are subject to FERC's review for "justness and reasonableness," whether the result of state-directed procurements or not. Where the price is competitively set by a seller without market power, FERC's review is limited because market-based rates are presumed valid. See *Morgan Stanley Capital Grp., Inc. v. Public Util. Dist. No. 1*, 554 U.S. 527, 547-48 (2008).

As a supplement to the many other markets and methods for selling capacity, FERC has encouraged regional transmission organizations to operate

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[9] Long-term contracts are central to the provision of reliable electric supply; the FPA is "premised" on them. *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968). They are a "key factor fostering stability in the electricity market, to the longrun benefit of consumers." *NRG*, 558 U.S. at 174.

forward markets for capacity sales. See, *e.g.*, *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 484 (D.C. Cir. 2009) (*"CDPUC"*). A forward market functions as a clearing house for purchases and sales, and can also generate "price signals" that may prompt investment in new plants (or retirement of old ones). See *New England Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 287 (D.C. Cir. 2014).

The D.C. Circuit approved FERC's development of organized forward capacity markets. See *CDPUC*, 569 F.3d at 484-85. FERC premised that approval by explaining that it was merely exercising its authority over wholesale prices and markets, which could incidentally spur power plant construction. Such incidental effects, the court said, would not displace or invade the States' primary authority over power plant construction. *Id.*

PJM's auction, the Reliability Pricing Model (RPM), operates in conjunction with, and in no way displaces, the many other methods of buying and selling capacity in the region. PJM surveys the region to predict how much capacity will be needed three years hence. Almost all generators must offer their capacity—*including capacity that is already the subject of other contracts, at prices different than the auction price*—for one year, three years in the future. Offers to sell are stacked, lowest to highest. The clearing price is the highest price PJM must accept to acquire the capacity to meet projected demand. Offers above that price are rejected. Accepted offers are paid the clearing price, no matter what the actual offer was. PJM buys the accepted capacity at the clearing price and resells it to auction purchasers. App.9a-10a.

Almost all capacity is offered into this auction at "zero"—meaning that offerors are "price takers,"

selling at *whatever* clearing price the auction produces. That is because a power plant requires enormous up-front capital investment. Once those costs are sunk, the cost of supplying capacity is small, so a rational offeror wants to be paid something, rather than nothing, and will offer at a price certain to clear. Moreover, utilities that have already bought capacity under long-term contracts are required to participate in the auction, and will likewise offer that contracted capacity into the auction at zero.

Given the reasoning of the Fourth Circuit, it bears emphasis that the auction clearing price controls auction sales, but does not set a price for the plethora of transactions outside the auction. It is a "residual" pricing model only. Much capacity offered into the auction is already subject to long-term bilateral contracts, under which local utilities (with the concurrence or at the direction of the State) buy capacity at negotiated or competitively bid prices, different from the auction price. FERC requires the owner of that capacity to offer it into the auction. In other words, the local utility buys capacity, long-term, and resells it at auction. The result is multiple prices for capacity, even for capacity later sold through the auction.

The net economic effect of state-directed bilateral capacity purchase agreements is, of course, the same as that of the contracts for differences at issue here: The local utility and its ratepayers absorb the difference between the long-term price at which it contracted, and whatever the yearly auction price turns out to be.

D. FERC Approved CPV's Sale Of Capacity In the Auction

New gas-fired generators are barred from entering the auction as price-takers, and are instead required to clear their first (but not subsequent) auction with a minimum offer price reflecting costs. Until the 2012 auction, however, FERC had exempted state-supported generators from minimum offer price rules, allowing them to bid zero so that state-sponsored projects would receive the clearing price for their capacity. *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 79, 86 (3d Cir. 2014) *("NJBPU")*.

In response to Maryland's and New Jersey's similar programs, FERC subjected state-supported generators to minimum offer price rules (to which they had formerly been exempted), but held that "even if discriminatory subsidies are being received, if the resource is needed at the [minimum offer price] then it . . . should be permitted to participate in the auction regardless of whether it also receives a subsidy." *Id.* at 98, 111 (FERC "permit[ted] states to develop whatever capacity resources they wish, and to use those resources to any extent that they wish, while approving rules that prevent the state's choices from adversely affecting wholesale capacity rates.") (internal quotation marks omitted).

CPV offered its capacity in the 2012 auction under these rules. Its offer cleared, meaning that its capacity will be sold, and FERC approved the clearing price. See *PJM Interconnection, L.L.C.*, 143 FERC ¶61,090, P 143 (2013).

E. The Decisions Below

Respondents include incumbent generators claiming that competition from the successful bidders would

affect their prices in the auction. They brought this case in the United States District Court for the District of Maryland against members of Maryland's Public Service Commission. Respondents also brought a parallel case challenging New Jersey's similar program. See *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014). Petitioner CPV intervened.

Respondents asserted that the Maryland initiative was "field preempted," "conflict preempted," and violated the Commerce Clause. The district court held for Respondents on "field preemption," App.129a, declined to resolve the conflict preemption claim, App.37a n.5, and rejected the Commerce Clause claim, App.37a.

CPV and the Maryland defendants appealed. The Fourth Circuit affirmed. On "field preemption," it held that the contract payments "effectively supplant[]" a wholesale rate, invading FERC's exclusive jurisdiction over rates. App.17a.

The panel also found conflict preemption. It held that "Maryland's initiative disrupts [FERC's] scheme by substituting the state's preferred incentive structure for that approved by FERC." App.23a. The Fourth Circuit did not identify the source of its belief that the FERC-supervised auction was an exclusive source of incentives, displacing the States.

The Fourth Circuit panel also held that Maryland's 20-year subsidy conflicted with FERC's "policy choice" to allow prices for sales *within* the auction to be locked in for only three years. The Fourth Circuit did not explain why an internal auction sales rule would apply to transactions outside of the auction, or why its reasoning would not similarly prohibit the many

existing long-term contracts with locked-in capacity prices.

REASONS TO GRANT THE PETITION

The Fourth Circuit's rulings (and those of the Third Circuit, addressing New Jersey's similar program) dangerously restructure the federal-state division of authority under the FPA – dangerously because they displace the only governmental authorities, the States, authorized to directly support new power plant construction. The decision disregards this Court's stringent standards for finding preemption within the framework of interlocking federal-state electricity regulation. It finds improper state rate-setting where the State set no rate. And it hobbles the States in structuring incentives for new power plant construction, as well as for clean and renewable energy initiatives.

As reflected in earlier decisions of the D.C. and Third Circuits, FERC's supervision of markets and rates gives FERC some incidental ability to influence power plant construction. But that incidental power leaves intact the States' primary authority: over power plant construction, over capacity and electricity "buy-side" decisions by state utilities, and over ratepayer charges to support those activities. In finding preemption based on a State's support of new plant construction through long-term, ratepayer-backed contracts with the State's local utilities, and in granting primacy to the federally-supervised capacity auction as a source of incentives, the decision below turns the FPA's division of responsibility upside down. It contradicts the basic premises upon which FERC initiated the capacity auctions.

Though the Fourth Circuit declared its ruling "limited," it is not. The broad theory of improper state rate-setting underlying the finding of "field preemption," and the equally broad notion of "conflict preemption" based on the idea that the federally-supervised auction displaces state-created incentives for power plant construction, strike at the core of the States' ability to support power plant construction through long-term contracts and rate-payer support. The legal premises of the decision are decidedly wrong, and the restructuring of state-federal authority dramatic.

Moreover, the practical future effects of the court's ruling, and the disabling threat they pose to the States' ability to support energy infrastructure, are, as shown below, even more pronounced. By curbing the use of state-directed contracts, at competitively determined prices, to encourage power plant construction and other energy initiatives, the decision will hobble the States' ability to assure the creation of reliable energy supplies to meet their citizens' – and, thus, the Nation's – energy infrastructure needs. Those needs cannot be directly addressed by FERC under the FPA; Congress left those matters to the States. For the reasons described below, the Court should grant certiorari to address the important questions presented.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS AND THE STRUCTURE OF THE FPA

A. The Decision Disregards The Standards For Finding FPA Preemption

All "pre-emption cases . . . start with the assumption that the historic police powers of the States were not

to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Pac. Gas & Elec.*, 461 U.S. at 205.[10] The FPA expressly preserves state authority, and forecloses FERC authority, over such matters.

FERC has exclusive jurisdiction over interstate sales and rates. 16 U.S.C. §824(a)-(b). FERC has jurisdiction over matters affecting or in connection with rates as well. FERC is denied "jurisdiction, except as specifically provided in this subchapter . . . over facilities used for the generation of electric energy." 16 U.S.C. §824(b)(1).

The resulting system of "interlocking" state-federal responsibility impacts preemption standards. With respect to *field* preemption, this Court cautioned, in the context of the FPA's sister statute, the Natural Gas Act, against "an extravagant . . . mode of interpretation" of FERC's authority that would undermine powers reserved to the States.[11] *Nw. Cent.*,

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[10] The Fourth Circuit's theory that this presumption can be disregarded because the FPA provides for federal regulation of interstate rates, App.20a, is a *non sequitur*. Maryland, here, exercised traditional powers over power plant construction, utility procurement decisions, and retail rates. The decision below bars States from exercising those powers.

[11] While *Northwest Central* interpreted the Natural Gas Act ("NGA"), the same principles apply under the FPA: Because the relevant provisions of the FPA and the Natural Gas Act are "in all material respects substantially identical," there is an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Ark. La.*

489 U.S. at 512-13. State programs are not field preempted merely because they affect matters within FERC's jurisdiction, as they inevitably do. Field preemption is found only where the State enters the federal sphere, as by setting rates for or regulating interstate transactions, *id.*, which Maryland did not do here.

Courts must be equally circumspect in judging *conflict* preemption, analyzing "sensitively" so as to preserve the States' role. *Id.* at 515. The general approach, anticipated by Congress, is one of federal accommodation, not preemption. *Id.* at 517-18. Conflict preemption is found only when interference with FERC's regulation is "so extensive and disruptive" that "federal accommodation must give way to federal pre-emption." *Id.*

Even on these basic points, the Fourth Circuit held to the contrary. It found that the mere fact that FERC had to *consider* accommodation and changed the auction rules in response to Maryland's initiative (albeit only by subjecting state-subsidized entities to the rules to which other new generators are subject) supported "conflict preemption." App.24a.

B. The Fourth Circuit Decision Conflicts With The Premises On Which FERC Initiated Use Of A Forward Market To Influence New Construction

The Fourth Circuit's preemption findings are inconsistent with the premises upon which FERC developed the forward capacity auctions.

Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981) (internal quotation marks omitted).

FERC encouraged development of forward capacity auctions in some regions in part to improve the ability of "the market" to generate cogent price signals to potential investors. But there is simply no *conflict* between improving market mechanisms to better "signal" future needs, and preserving the States' authority to support new power plant construction through specific competitive procurements for bilateral contracts when existing markets alone are not filling the need. FERC acknowledged from the outset that a forward capacity auction will not always be "sufficient to provide appropriate incentives for efficient investment decisions—whether new entry or a retirement decision is at stake."[12] FERC explicitly *acknowledged* the continuing role of long-term bilateral capacity contracts in providing incentives to build new power plants.[13] Most recently, in approving auction rule changes in response to Maryland's (and New Jersey's) program, FERC disclaimed any desire to "interfere with states or localities that, for policy reasons, seek to provide assistance for new capacity entry if they believe such expenditures are appropriate for their state."[14]

This makes perfect sense under the FPA. States look farther into the future than a three year forward

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[12] *PJM Interconnection, L.L.C.*, 117 FERC ¶61,331, P 77 (2006).

[13] In response to an objection that the auction was an "intrusion into state jurisdiction over generation," FERC explained that there was no intrusion because utilities may continue to "create an incentive for the construction of new capacity by entering into long-term bilateral agreements . . ." *PJM Interconnection, L.L.C.*, 115 FERC ¶61,079, P 172 (2006).

[14] 137 FERC at PP 3, 89; *PJM Interconnection, L.L.C.*, 135 FERC ¶61,022, P 141 (2011).

market. They can assess economic conditions and encourage investment when capital is tight. They can consider the benefits of a diverse fuel mix, and environmental or renewable energy objectives about which an auction "market" is indifferent. States necessarily fill those roles because FERC itself is denied the power to order the creation of new generation capacity.

In *CDPUC*, the D.C. Circuit evaluated the nascent auction being implemented in New England, concluding that it was an appropriate incident to FERC's market and rate regulation. 569 F.3d at 484-85; see also *Electric Power Supply Ass'n v. FERC*, 753 F.3d 216, 222 n.2 (D.C. Cir. 2014) (describing FERC as having "incidentally incentivized construction of more generation facilities, which are subject to State control"). It did so on the explicit understanding that such an auction left intact the States' "right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from [FERC]." *CDPUC*, 569 F.3d at 481.

Thus, until the Fourth Circuit's decision here, the respective spheres of authority were well defined. On the one hand, FERC could supervise the auction to ensure that it operates as intended, including how state-subsidized entities could participate in the auction. See *NJBPU*, 744 F.3d 74 (approving rules for state-subsidized generators); *New England Power Generators*, 757 F.3d at 290-91 (approving rules for a New England auction). On the other hand,

> [S]tates remain free to subsidize the construction of new generators, and load

> serving entities to build or contract for any self-supply they believe is necessary.

Id. at 291. States could continue to direct their local utilities to enter into contracts serving the State's energy sufficiency and reliability objectives. The only limit beyond that was that States could not set the prices (or review prices) for interstate power purchases. The Fourth Circuit here turned this framework upside down, holding that FERC's auction has, in fact, displaced the States' powers to support new power plant construction because that would "disrupt" the FERC-supervised auction.

C. The Fourth Circuit Has Fundamentally Altered the FPA's Division of State-Federal Authority

The Fourth Circuit's rulings reflect basic misunderstandings about the FPA regulatory framework established by FERC and the FPA itself.

1. The Fourth Circuit's "field preemption" theory improperly finds that these contracts contained rates set by the State

The Fourth Circuit's *field* preemption ruling was wrong for two reasons. First, the contract payments the Fourth Circuit found objectionable are not "rates" subject to FERC's exclusive jurisdiction. Second, and more important, whether or not subject to FERC's jurisdiction, they were not "set" by Maryland, and therefore, do not invade FERC's exclusive jurisdiction.

a. The contracts do not contain rates subject to FERC review

Maryland's local utilities do not purchase electricity or capacity from CPV under the contracts at issue. Yet

FERC's rate-review jurisdiction is "limited to contracts [] which directly govern[] the rate in a jurisdictional sale—providing for the rate in whole or in part, or specifying or embodying it, or setting forth rules by which it is to be calculated."[15] Financial payments separate from such sales are not rates subject to FERC's review.[16] Thus, the contracts do not fall within FERC's jurisdiction (and FERC has not asserted jurisdiction)—though, as shown below, it would make no difference for preemption purposes if they did because the prices were not *set* by the State.[17]

The Fourth Circuit acknowledged as much but held that Maryland's program "effectively supplants" the auction rate and therefore "intrudes on FERC's jurisdiction." App.17a. The Fourth Circuit invoked this Court's "filed rate" cases, *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). See App.18a.

But the Fourth Circuit misunderstood those cases. First, the FPA's filed rate doctrine does not contemplate a single uniform rate at which electricity or capacity must be bought and sold at any one time. To the contrary, under the FPA, parties buy and sell at

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[15] *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004) (internal quotation marks omitted).

[16] See *Revised Pub. Util. Filing Requirements*, 97 FERC ¶61,317, *4-5 (2001); *N.Y. Mercantile Exch.*, 74 FERC ¶ 61,311, 61,986-87 (1996) (FERC has no jurisdiction over a futures contract that can be settled financially, unless the contract goes to delivery).

[17] FERC might choose to assert jurisdiction because the contracts "affect," or are "in connection with," interstate rates. See 16 U.S.C. §§824d, 824e.

prices of their choosing.[18] The auction only establishes *a* rate for capacity sold in the auction. Capacity, including capacity resold in the auction, is routinely sold at prices different from auction prices. That there is a *difference* between what CPV will receive under its long-term contract, on the one hand, and what it will receive for capacity in the yearly auction, on the other, is immaterial for preemption purposes.

Second, the basis for finding preemption in the "filed rate" cases was the fact that an electric utility had bought or was already committed to buy energy on terms subject to FERC's jurisdiction—and the State then second-guessed those terms by preventing its electric utility from recovering the resulting costs. *Nantahala*, 476 U.S. at 970; *Mississippi Power & Light*, 487 U.S. at 372. In each case, the State substituted its judgment for FERC's, resulting in unrecoverable payments by the utilities, "trapped costs." There is no analogous trapped cost or second-guessing of a FERC-jurisdictional purchase here. To the contrary, the State's input here was prospective, as part of its control over utility buy-side decisions. It does not "stand[] to reason" (as the Fourth Circuit put it, App.18a), that the "filed rate" doctrine applies equally to payments that exceed the auction price based on a State's buy-side direction. Neither FERC nor any court has ever so held. Indeed, it is no surprise that the prices to support new construction, in a

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[18] *NRG*, 558 U.S. at 167 ("a rate set by a freely negotiated wholesale-energy contract meets the statutory just and reasonable requirement") (internal quotation marks omitted).

particular locale, over a long-term,[19] are different from one-year auction prices.

The economic effect of States directing local utilities to enter into long-term capacity purchase contracts is precisely the same as the contracts for differences here. The utility buys capacity over a long-term at a fixed price. It must then offer that capacity in the auction, and obtain whatever price the auction provides. The utility receives (or pays) the difference between its contract price and the auction price. The payment of that difference is what the Fourth Circuit deemed preempted here.

b. Maryland *set* no rates

Contracts and rates subject to FERC's review jurisdiction do not usurp FERC jurisdiction. Rather, they submit to that jurisdiction, and are not preempted. Indeed, by holding these contracts invalid, the Fourth Circuit (on its theory that the contracts invade FERC's jurisdiction) paradoxically prevented FERC from reviewing these contracts.[20]

The more important point for preemption, however, is that whether or not these contracts are reviewable by FERC, they are not preempted. That is because the prices set forth in the contracts were not *set* by, or reviewed by, Maryland, but by CPV, as offeror, in a competitive procurement. In other words, the issue

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[19] It would be "perverse" to expect such contracts to mimic single year prices. See *Morgan Stanley*, 554 U.S. at 547-48, 551 ("parties enter into wholesale-power contracts . . . to hedge against the volatility that market imperfections produce").

[20] FERC so held. *CPV Shore, L.L.C., CPV Maryland, L.L.C.*, 148 FERC ¶61,096, PP 28-31 (2014) (ruling that it could not review the contracts because the court declared them invalid).

whether these contracts contain a FERC-jurisdictional rate determines whether the contracts are subject to FERC review. But it does not determine whether the State has purported to exercise a power – to set or determine rates for interstate sales – reserved to FERC by the FPA. Here, the State simply exercised its authority to direct its utilities' buy-side decisions. The Fourth Circuit missed this distinction.

It is well established that States retain authority over "resource planning and utility buy-side decisions." See *New York*, 535 U.S. at 24. States may thus direct utilities to buy capacity or energy under long-term agreements. See, *e.g.*, 18 C.F.R. §35.27 (FERC recognizing States' authority to "establish . . . [c]ompetitive procedures for the acquisition of electric energy"); see also *Cal. Pub. Utils. Comm'n*, 134 FERC at P 30 & n.62 (States may "dictate the generation resources from which utilities may procure electric energy.").

A State crosses the line into exclusive FERC territory not by directing its utilities to enter into contracts reviewable by FERC, but only if it purports to mandate the price at which capacity is purchased, rather than allow it to be established by negotiation, or, as here, by competitive bid. The State exercises the kind of governmental power over rates reserved to FERC by the FPA only if it sets or reviews the rate for reasonableness. FERC's cases reflect this basic distinction. Compare *Allegheny Energy Supply Co.*, 108 FERC ¶61,082, PP 15, 20, 21 (2004) (approving a state procurement where competitively bid prices "were binding. Winning bidders received the actual price in their offers . . . ."), with *Cal. Pub. Utils. Comm'n*, 132 FERC at P 64 (state-imposed rate is preempted); *Midwest*, 78 FERC at 61,246, 61,248

(state-directed procurement "preempted to . . . the extent [the State] set[s] rates for the wholesale sales of electric energy").

By conducting a procurement, without setting a price, Maryland did not usurp any power reserved to FERC. The Fourth Circuit – like the Third, whose decision followed – missed this basic point. In so doing, these two Circuits have eviscerated a clear line between permissible procurements and impermissible state rate-review, hobbling the States' ability to support needed power plant construction and other energy initiatives in the process.

2. Maryland's initiative does not conflict with any federal policy

The Fourth Circuit's "conflict preemption" theory is also untenable. There was no actual conflict between Maryland's program and the auction. FERC may make rules that protect the auction. FERC here changed the auction's rules (which had exempted state-supported generators from minimum offer price requirements) to address Maryland's (and New Jersey's similar) subsidy. See *NJBPU*, 744 F.3d 74. With those changes, FERC concluded that auction sales by state-supported generators are "competitive" and "economic," "regardless of whether [the generator] also receives a subsidy." *Id.* at 91-92, 97, 110 (internal quotation marks omitted). The Third Circuit affirmed FERC's revisions as "prevent[ing] the state's choices from adversely affecting wholesale capacity rates." *Id.* at 98.

In the absence of a concrete conflict, the Fourth Circuit discerned a conflict in the notion that "Maryland's initiative disrupts this scheme by substituting the state's preferred incentive structure

for that approved by FERC." App.23a. But that "disruption" rests on the false premise that auction "price signals" were to be an exclusive source of "incentives" for constructing power plants. There is no evidence that FERC, let alone Congress, had that intention.

There is nothing incompatible about FERC, on the one hand, organizing an auction to allow the "market" to more effectively encourage investment, and States retaining their historic authority to support infrastructure development through long-term contracts when economic conditions are not otherwise attracting the necessary investment capital. A preference for market solutions is not inconsistent with States retaining power to support energy initiatives through procurements.

The Fourth Circuit also cited an auction rule that allows new generators in certain situations to lock in a price that *auction purchasers* must pay for a three year period—even if later auction prices are lower. The Fourth Circuit found in this rule a FERC "policy" against state *subsidies* extending more than three years. But, in fact, FERC was simply making a rule about auction sales for auction purchasers. Such a rule says nothing at all about the duration of subsidies or contracts outside the auction, which impose no added cost on auction purchasers at all.

II. THE FOURTH CIRCUIT'S DECISION DEPRIVES STATES—AND FERC—OF AUTHORITY NEEDED TO SUPPORT THE NATION'S ELECTRIC INFRASTRUCTURE

The Fourth Circuit's decision nullifies Maryland's program for a much needed power plant. New Jersey's similar initiative was nullified on a similar and

equally doubtful basis. See *Solomon*, 766 F.3d 241. But the importance of these decisions extends far beyond these vital power plants. As described above, the assurance of stable long-term revenue has always been necessary to attract capital to build new power plants, and it continues to be necessary. Thus, virtually all power plant construction—more than 97% —is supported by long-term ratepayer commitments. In States without vertically-integrated utilities (where ratepayer commitment to offset prudently incurred costs follows routinely), new power plants will not be built—nor other energy initiatives pursued—without the revenue assurances provided by long-term contracts.[21]

State authority to support needed infrastructure development by directing the purchasing decisions of its utilities is more critical than ever. A substantial portion of the Nation's coal-fired power supply is being retired. Environmental regulations and economic factors favoring natural gas over coal are driving the change.[22] The Department of Energy projects that 50 GW of the Nation's existing 310 GW of coal-fired generating capacity will be retired by 2020.[23] PJM estimates retirements of between 11 and 25 GW in the

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[21] In 2013, only 2.4 percent of new capacity was built solely for open sales into interstate markets. *2014 APPA Study* at 1-2 and Table 1. And the vast majority of even that small proportion received some type of subsidy. *Id.* at 2.

[22] See PJM, *Coal Capacity at Risk for Retirement in PJM: Potential Impacts of the Finalized EPA Cross State Air Pollution Rule and Proposed National Emissions Standards for Hazardous Air Pollutants* at 10-15 (2011) *("2011 PJM Study")*.

[23] U.S. Energy Information Administration, *Annual Energy Outlook 2014* at IF-34 (Apr. 2014).

region,[24] and independent analyses indicate up to 21 GW of retirements by 2018.[25] Even more closures are likely in light of the Environmental Protection Agency's June 2014 proposed regulation calling on States to take the lead in reducing carbon dioxide emissions from power plants.[26]

The long-term contract mechanism to support infrastructure development used here by Maryland (and by New Jersey, see *Solomon*, 766 F.3d at 248-49) —a contract for differences—is especially important because it is ideally suited to its purpose of providing ratepayer support for power plant construction. Ratepayers pay only what is needed to support the intended result (whether a new natural gas-fired power plant or a wind farm), net of what the developer earns anyway by selling its capacity in the interstate market. New Jersey, for example, subsidizes renewable energy generation by measuring the difference between the bid price, and the price earned through sales.

Other States have used similar mechanisms to encourage *renewable* energy production and carry out other facets of electric resource planning. Connecticut, for example, used this mechanism to support renewable power projects.[27] And States similarly direct their local utilities to negotiate cost-based contracts with

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[24] See *2011 PJM Study* at 27-28.

[25] Onur Aydin, Frank Graves, and Metin Celebi, *Coal Plant Retirements: Feedback Effects on Wholesale Electricity Prices*, The Brattle Group (Nov. 2013).

[26] EPA, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Proposed Rule*, 79 Fed. Reg. 34,830 (Jun. 18, 2014).

[27] Conn. Pub. Act 13-303, Section 6 (2013).

economically distressed power plants where loss of the power plant's capacity could negatively impact reliable electric supplies for the State.[28] Thus, the decision below has immediate implications for a range of initiatives already in place, beyond support for new, traditional fuel power plants.

Long-term contracts are particularly effective in supporting development of new technology and fuel diversity. Massachusetts established a program under which it ordered its utilities to enter into long-term contracts with renewable power developers.[29] Illinois sought to promote clean coal technology, and so used its procurement power to require its utilities to enter into long-term power purchase agreements with a firm building the world's first zero emission coal-fired power plant.[30] Nevada,[31] Rhode Island,[32] and other States also rely on state-run procurements to secure the long-term contracts necessary to cover the enormous costs of power plant development.

While the Fourth Circuit protectively pronounced its ruling "narrow," it sweeps broadly. The Fourth

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[28] See Jeff Beattie, "New York Regulators Throw Lifeline to Exelon's Struggling Ginna Nuke," *HIS Energy Daily* (Nov. 17, 2014); see also Resolution E-4471, Pub. Utils. Comm'n of Cal. (Mar. 22, 2012) (state-directed procurement to support continued operations at a natural gas-fired power plant); "Calpine Executes Contracts for Sutter Energy Center With California Utilities," *Reuters* (May 7, 2012), http://goo.gl/tPq07o. (same).

[29] 2012 Mass. Legis. Serv., ch. 209, §35.

[30] See *Commonwealth Edison Co. v. Ill. Commerce Comm'n*, 2014 IL App (1st) 130544 (2014).

[31] Nev. Rev. Stat. §704.7316.

[32] *In re Review of Proposed Town of New Shoreham Project*, 25 A.3d 482 (R.I. 2011).

Circuit's field preemption theory rests on the erroneous premise that by directing a local utility's buy-side decision through a competitive procurement, a State is thereby setting a rate different from the auction rate, and thus invading FERC's exclusive rate-review authority. That holding bars States from employing one of their traditional, and certainly most effective, tools—the offer of long-term, ratepayer-supported contracts—to encourage investment in new power plants or to support other energy initiatives.

Moreover, there is nothing unusual—or preempted—about the fact that such long-term contracts produce prices different from auction prices. Almost all capacity, including capacity already subject to bilateral contracts at prices different from auction prices (whether state-directed or not), must be bid into its capacity auction. All such contracts, particularly long-term agreements, create a price for capacity sold in the yearly auction that is not the auction price. Cf. App.19a. The economic effect of long-term capacity purchase agreements on the parties, and on the auction, is the same as the contracts for differences at issue here.

The Fourth Circuit's conflict preemption ruling is arguably even more expansive. According to the Fourth Circuit, Maryland disrupted the federal regulatory framework "by substituting the state's preferred incentive structure for that approved by FERC." App.23a. Under this theory, any special state incentive to encourage new generation—or reject new construction—would contradict the "incentive structure" of the auction market. In addition, by capping generators' compensation at the auction price, the ruling seemingly forecloses the States' ability to

opt for more expensive options, such as solar, wind, nuclear, or clean coal.

The Fourth Circuit's decision thus strips the States of basic tools that they need and use to support investment in energy infrastructure.[33] And because FERC itself lacks authority in this field, stripping the States of such powers dangerously leaves no government with the authority to intervene directly to ensure that the Nation's urgent need for adequate supplies of electricity are met.

Finally, while resting on the notion that preemption was necessary here to protect FERC's authority, the Fourth Circuit's rulings actually diminished that authority. By invalidating these contracts as preempted, the Fourth Circuit prevented FERC from reviewing them to determine whether they are just and reasonable.[34] And while finding that Maryland's program conflicts in some way with the FERC-supervised auction, the appellate court effectively overrode FERC's determination that Petitioner could sell its capacity in the auction without any harm to that auction.

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[33] The Fourth Circuit's alternative conflict preemption ruling is equally broad. It equates FERC's many decisions about how the *auction* should operate with an "explicit policy choice" that preempts state actions outside the auction. App.24a.

[34] See *CPV Shore*, 148 FERC at PP 28-31 (FERC ruling that it could not review the contracts because the court declared them invalid).

APPENDIX

CONCLUSION

The petition should be granted.

Respectfully submitted,

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November 26, 2014

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-2419

PPL ENERGYPLUS, LLC; PPL BRUNNER ISLAND, LLC; PPL HOLTWOOD, LLC; PPL MARTINS CREEK, LLC; PPL MONTOUR, LLC; PPL SUSQUEHANNA, LLC; LOWER MOUNT BETHEL ENERGY, LLC; PPL NEW JERSEY SOLAR, LLC; PPL NEW JERSEY BIOGAS, LLC; PPL RENEWABLE ENERGY, LLC; PSEG POWER LLC; ESSENTIAL POWER, LLC,

Plaintiffs Appellees,

v.

DOUGLAS R.M. NAZARIAN; HAROLD WILLIAMS; LAWRENCE BRENNER; KELLY SPEAKES-BACKMAN; KEVIN HUGHES,

Defendants - Appellants,

and

CPV MARYLAND, LLC,

Defendant.

AMERICAN PUBLIC POWER ASSOCIATION; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; NRG ENERGY INC.; MARYLAND OFFICE OF PEOPLE'S COUNSEL; CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY; CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION;

GEORGE JEPSEN, Attorney General for the State of Connecticut; CONNECTICUT OFFICE OF CONSUMER COUNSEL; NEW ENGLAND CONFERENCE OF PUBLIC UTILITIES COMMISSIONERS, INC.; MAINE PUBLIC UTILITIES COMMISSION; RHODE ISLAND PUBLIC UTILITIES COMMISSION; VERMONT PUBLIC SERVICE BOARD; VERMONT DEPARTMENT OF PUBLIC SERVICE; CALIFORNIA PUBLIC UTILITIES COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (NYPSC); PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA; DELAWARE PUBLIC SERVICE COMMISSION; NEW JERSEY BOARD OF PUBLIC UTILITIES; NEW JERSEY DIVISION OF RATE COUNSEL; MARYLAND ENERGY ADMINISTRATION; AMERICAN WIND ENERGY ASSOCIATION; THE MID-ATLANTIC RENEWABLE ENERGY COALITION,

Amici Supporting Appellants,

PJM POWER PROVIDERS GROUP; ELECTRIC POWER SUPPLY ASSOCIATION; EDISON ELECTRIC INSTITUTE,

Amici Supporting Appellees.

No. 13-2424

PPL ENERGYPLUS, LLC; PPL BRUNNER ISLAND, LLC; PPL HOLTWOOD, LLC; PPL MARTINS CREEK, LLC; PPL MONTOUR, LLC; PPL SUSQUEHANNA, LLC; LOWER MOUNT BETHEL ENERGY, LLC; PPL NEW JERSEY SOLAR, LLC; PPL NEW JERSEY BIOGAS, LLC; PPL RENEWABLE ENERGY, LLC; PSEG POWER LLC; ESSENTIAL POWER, LLC,

Plaintiffs - Appellees,

v.

CPV MARYLAND, LLC,

Defendant - Appellant,

and

DOUGLAS R.M. NAZARIAN; HAROLD WILLIAMS; LAWRENCE BRENNER; KELLY SPEAKES-BACKMAN; KEVIN HUGHES,

Defendants.

AMERICAN PUBLIC POWER ASSOCIATION; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; NRG ENERGY INC.; MARYLAND OFFICE OF PEOPLE'S COUNSEL; CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY; CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION; GEORGE JEPSEN, Attorney General for the State of Connecticut; CONNECTICUT OFFICE OF CONSUMER COUNSEL; NEW ENGLAND CONFERENCE OF PUBLIC UTILITIES COMMISSIONERS, INC.; MAINE PUBLIC UTILITIES COMMISSION; RHODE ISLAND PUBLIC UTILITIES COMMISSION; VERMONT PUBLIC SERVICE BOARD; VERMONT DEPARTMENT OF PUBLIC SERVICE; CALIFORNIA PUBLIC UTILITIES COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (NYPSC); PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA; DELAWARE PUBLIC SERVICE COMMISSION; NEW JERSEY BOARD OF PUBLIC UTILITIES; NEW JERSEY DIVISION OF RATE COUNSEL; MARYLAND ENERGY ADMINISTRATION; AMERICAN WIND ENERGY ASSOCIATION; THE MID-ATLANTIC RENEWABLE ENERGY COALITION,

Amici Supporting Appellant,

PJM POWER PROVIDERS GROUP; ELECTRIC POWER SUPPLY ASSOCIATION; EDISON ELECTRIC INSTITUTE,

Amici Supporting Appellees.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Marvin J. Garbis, Senior District Judge. (1:12-cv-01286-MJG)

Argued: May 13, 2014 Decided: June 2, 2014

Before WILKINSON, KEENAN, and DIAZ, *Circuit Judges*.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Keenan and Judge Diaz joined.

ARGUED: Scott H. Strauss, SPIEGEL & MCDIARMID, LLP, Washington, D.C.; Clifton Scott Elgarten, CROWELL & MORING LLP, Washington, D.C., for Appellants. Paul D. Clement, BANCROFT, PLLC, Washington, D.C., for Appellees. **ON BRIEF**: H. Robert Erwin, Ransom E. Davis, Baltimore, Maryland; Peter J. Hopkins, Jeffrey A. Schwarz, SPIEGEL & MCDIARMID LLP, Washington, D.C., for Appellants Douglas R.M. Nazarian, Harold Williams, Lawrence Brenner, Kelly Speakes-Backman, and Kevin Hughes. Larry F. Eisenstat, Richard Lehfeldt, Jennifer N. Waters, CROWELL & MORING LLP, Washington, D.C., for Appellant CPV Maryland, LLC. Erin E. Murphy, Candice Chiu, BANCROFT PLLC, Washington, D.C., for *Amici*. Jesse A. Dillon, PPL SERVICES CORP., Allentown, Pennsylvania; David L. Meyer, MORRISON & FOERSTER LLP, Washington, D.C., for Appellees PPL EnergyPlus,

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Associate General Counsel, Regulatory and Litigation, EDISON ELECTRIC INSTITUTE, Washington, D.C., for *Amicus* Edison Electric Institute.

WILKINSON, Circuit Judge:

At issue is a Maryland program to subsidize the participation of a new power plant in the federal wholesale energy market. Appellees are energy firms that compete with this new plant in interstate commerce. They contend that the Maryland scheme is preempted under the Federal Power Act's authorizing provisions, which grant exclusive authority over interstate rates to the Federal Energy Regulatory Commission. The district court agreed. For the reasons that follow, we affirm.

I.

A.

For much of the 20th century, the energy market was dominated by vertically integrated firms that produced, transmitted, and delivered power to end-use customers. *New York v. FERC*, 535 U.S. 1, 5 (2002); *PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 798 (D. Md. 2013) (opinion below). These firms were subject to extensive local regulation, though state power in this respect was limited by the strictures of the dormant Commerce Clause. *See Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927).

The Federal Power Act (FPA), passed in 1935, was designed in part to fill the regulatory gap created by the dormant Commerce Clause and cover the then-nascent field of interstate electricity sales. It vests the Federal Energy Regulatory Commission (FERC) with

authority over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). Federal regulation has become increasingly prominent as the energy market has shifted away from local monopolies to a system of interstate competition. *See New York*, 535 U.S. at 7.

Rather than ensuring the reasonableness of interstate transactions by directly setting rates, FERC has chosen instead to achieve its regulatory aims indirectly by protecting "the integrity of the interstate energy markets." *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 81 (3d Cir. 2014). To this end, FERC has authorized the creation of "regional transmission organizations" to oversee certain multistate markets. PJM Interconnection, LLC (PJM), superintended by FERC, administers a large regional market that (as relevant here) includes Maryland and the District of Columbia.

PJM operates both energy and capacity markets. The energy market is essentially a real-time market that enables PJM to buy and sell electricity to distributors for delivery within the next hour or 24 hours.

The capacity market is a forward-looking market, which gives buyers the option to purchase electricity in the future. In the capacity market, PJM sets a quota based on how much capacity it predicts will be needed three years hence and then relies on a Reliability Pricing Model (RPM) to determine the appropriate price per unit. Auction participants bid to sell capacity for a single year, three years in the future. PJM stacks the bids from lowest to highest and, starting at the bottom, accepts bids until it has acquired sufficient capacity to satisfy its quota.

The highest-priced bid that PJM must accept to meet this quota establishes the market-clearing price. Every generator who bids at or below this level "clears" the market and is paid the clearing price, regardless of the price at which it actually bid. Existing generators are permitted to bid at zero as "price-takers," meaning they agree to sell at whatever the clearing price turns out to be.

Both the capacity and energy markets are designed to efficiently allocate supply and demand, a function which has the collateral benefit of incentivizing the construction of new power plants when necessary. Clearing prices occasionally differ based on geographical subdivisions designed by FERC to stimulate new construction by signaling that certain regions are prone to supply shortages. Such price signals are not the sole mechanism for incentivizing generation, however. PJM's new entry price adjustment (NEPA) guarantees certain new producers a fixed price for three years to "support . . . the new entrant until sufficient load growth [*i.e.*, increased demand] would be expected to" do so. *PJM Interconnection, LLC*, 128 FERC ¶ 61,157, at ¶ 101 (2009).

In 2006, FERC instituted a requirement (the minimum offer price rule, or MOPR) that new generators in certain circumstances bid at or above a specified price, fixed according to the agency's estimation of a generic energy project's cost. This rule was designed to prevent the manipulation of clearing prices through the exercise of buyer market power. The MOPR originally exempted certain state-supported generators, however, and permitted them to bid at zero.

Following a complaint lodged by several competitors, FERC eliminated the exemption for

state-sanctioned plants. The new rule required such plants to bid initially at the agency-specified minimum price unless they could demonstrate that their actual costs were lower than this default price. FERC held that this adjustment was necessary to protect the integrity of its markets against below-cost bids by subsidized plants that might artificially suppress clearing prices. *See PJM Interconnection, LLC*, 137 FERC ¶ 61,145, at ¶ 96 (2011).

As these features suggest, the federal markets are the product of a finely-wrought scheme that attempts to achieve a variety of different aims. FERC rules encourage the construction of new plants and sustain existing ones. They seek to preclude state distortion of wholesale prices while preserving general state authority over generation sources. They satisfy short-term demand and ensure sufficient long-term supply. In short, the federal scheme is carefully calibrated to protect a host of competing interests. It represents a comprehensive program of regulation that is quite sensitive to external tampering.

B.

In 1999, Maryland decided to abandon the vertical integration model and throw in its lot with the federal interstate markets. Deregulation was accomplished by the Electric Customer Choice and Competition Act, Md. Code Ann., Pub. Utils. § 7-501, *et seq.*, which divested utilities of their generation resources, effectively compelling Maryland energy firms to participate in the federal wholesale markets. *See PPL EnergyPlus, LLC*, 974 F. Supp. 2d at 815. The state believed that these markets would ultimately produce more efficient and cost-effective service than traditional monopolies, thus providing state residents the benefit of lower prices. *See In the Matter of*

Baltimore Gas and Electric Company's Proposal, Order No. 81423, at 36 (Md. Pub. Serv. Comm'n, May 2007). Maryland's decision to participate in the federal scheme and enjoy its benefits was necessarily accompanied by a relinquishment of the regulatory autonomy the state had formerly enjoyed with respect to traditional utility monopolies.

Maryland soon became concerned, though, that the RPM was failing to adequately incentivize new generation. *PPL EnergyPlus, LLC*, 974 F. Supp. 2d at 795. To solve this perceived problem, the Maryland Public Service Commission (MPSC) solicited proposals for the construction of a new power plant. The plant was to be located in the "SWMAAC zone," an area comprising part of Maryland and all of D.C., which the state believed was at heightened risk for reliability problems. In order to attract offers, the MPSC offered the successful bidder a fixed, twenty-year revenue stream secured by contracts for differences (CfDs) that the state would compel one or more of its local electric distribution companies (EDCs) to enter. Maryland's plan was ultimately formalized in the Generation Order, issued by MPSC in 2012.

Intervenor-appellant Commercial Power Ventures Maryland, LLC (CPV) submitted the winning bid and was awarded the promised CfDs. The CfDs required CPV to build a plant and sell its energy and capacity on the federal interstate wholesale markets. If CPV successfully cleared the market, it would be eligible for payments from the EDCs amounting to the difference between CPV's revenue requirements per unit of energy and capacity sold (set forth in its winning bid) and its actual sales receipts. These costs would in turn be passed on to the EDCs' retail ratepayers. If CPV's receipts exceeded its approved revenue requirements,

it would be obligated to pay the difference to the EDCs. The CfDs did not require CPV to actually sell any energy or capacity to the EDCs.

Plaintiffs-appellees are existing power plants in competition with CPV who allege that the Generation Order is unconstitutional and has resulted in the suppression of PJM prices, a reduction in their revenue from the PJM market, and a distortion of the price signals that market participants rely on in determining whether to construct new capacity. After a six-day bench trial, the district court found the Generation Order field preempted. It reasoned that the CfD payments had the effect of setting the ultimate price that CPV receives for its sales in the PJM auction, thus intruding on FERC's exclusive authority to set interstate wholesale rates. It did not reach appellees' conflict preemption claim and rejected their dormant Commerce Clause claim. This appeal followed.

II.

Plaintiffs argue that the Generation Order and the resulting CfDs are preempted by federal law under the Supremacy Clause. U.S. Const. art. VI, cl. 2. They ground this contention in two alternative theories: field preemption and conflict preemption. We address each in turn.[1]

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[1] As a threshold matter, appellants assert that we lack jurisdiction under the filed rate doctrine. *See* Appellants' Br. at 9. This claim is meritless, however, given that a judgment in plaintiffs' favor would require this court neither "to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question." *Pub. Util. Dist. No. 1 v. IDACORP Inc.*, 379 F.3d 641, 650 (9th Cir. 2004) (internal quotation marks omitted).

A.

Preemption of all varieties is ultimately a question of congressional intent. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989). Here, the district court found the Generation Order invalid under the doctrine of field preemption, which applies when "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Id.* Actual conflict between a challenged state enactment and relevant federal law is unnecessary to a finding of field preemption; instead, it is the mere fact of intrusion that offends the Supremacy Clause. *See N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 97-98 (1963). "If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

Statutory text and structure provide the most reliable guideposts in this inquiry. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) ("Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it.") (internal quotation marks omitted). The FPA's "declaration of policy" states:

> It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at

> wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

16 U.S.C. § 824(a); see also id. at § 824(b).

The breadth of this grant of authority is confirmed by the FPA's similarly capacious substantive and remedial provisions. For example, 16 U.S.C. § 824d(a) states that:

> All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

A wealth of case law confirms FERC's exclusive power to regulate wholesale sales of energy in interstate commerce, including the justness and reasonableness of the rates charged. "The [FPA] long has been recognized as a comprehensive scheme of federal regulation of all wholesales of [energy] in interstate commerce," *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (internal quotation marks omitted), and "FERC's jurisdiction over interstate wholesale rates is exclusive," *Appalachian Power Co. v. Pub. Serv. Comm'n*, 812 F.2d 898, 902 (4th Cir. 1987); *see also New England Power Co. v.*

New Hampshire, 455 U.S. 331, 340 (1982).[2] In this area, "if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring in the judgment).

Indeed, the Supreme Court has expressly rejected the proposition that the "scope of [FERC's] jurisdiction . . . is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (quoting *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964)) (internal quotation marks omitted). Instead, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction . . . . This was done in the [FPA] by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *Id.* (quoting *S. Cal. Edison Co.*, 376 U.S. at 215-16) (internal quotation marks omitted).

The federal scheme thus "leaves no room either for direct state regulation of the prices of interstate wholesales of [energy], or for state regulations which would indirectly achieve the same result." *N. Natural Gas Co.*, 372 U.S. at 91 (citation omitted). "Even where state regulation operates within its own field, it may

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[2] *Schneidewind* dealt with the Natural Gas Act rather than the FPA. However, because "the relevant provisions of the two statutes are in all material respects substantially identical," the Supreme Court has adopted an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 n.7 (1981) (internal quotation marks omitted).

not intrude indirectly on areas of exclusive federal authority." *Pub. Utils. Comm'n v. FERC*, 900 F.2d 269, 274 n.2 (D.C. Cir. 1990) (internal quotation marks omitted). As a result, states are barred from relying on mere formal distinctions in "an attempt" to evade preemption and "regulate matters within FERC's exclusive jurisdiction." *Schneidewind*, 485 U.S. at 308.

B.

Applying these principles, we conclude that the Generation Order is field preempted because it functionally sets the rate that CPV receives for its sales in the PJM auction.

The CfD payments, which are conditioned on CPV clearing the federal market, plainly qualify as compensation for interstate sales at wholesale, not simply for CPV's construction of a plant. Furthermore, the Order ensures—through a system of rebates and subsidies calculated on the basis of the PJM market rate—that CPV receives a fixed sum for every unit of capacity and energy that it clears (up to a certain ceiling). The scheme thus effectively supplants the rate generated by the auction with an alternative rate preferred by the state. *See Appalachian Power Co.*, 812 F.2d at 904 (holding that the agreement at issue did not "set a rate per se," but that it nevertheless "sufficiently resemble[d] a filed rate to come within the realm of exclusive federal jurisdiction"). The Order thus compromises the integrity of the federal scheme and intrudes on FERC's jurisdiction.

Maryland and CPV argue that the Generation Order does not actually set a rate because it does not directly affect the terms of any transaction in the federal market. Relevantly, appellants contend, the Order does not fix the rate that PJM pays to CPV for its sales

in the auction; instead, it merely fixes the rate that CPV receives for such sales. On the basis of this asymmetry, appellants contend that the CfD payments represent a separate supply-side subsidy implemented entirely outside the federal market.

We cannot accept this argument. The case of *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), is illustrative. There, FERC ordered a utility to purchase a specified percentage of a particular generator's output. *Id.* at 363. The utility petitioned Mississippi to approve an increase in its retail rates to cover the costs imposed by the order, but the state insisted that it retained the authority to determine whether the purchases were prudent before acceding to the request. *Id.* at 365-67. The Supreme Court rejected this argument, ruling that the state was required to treat the utility's FERC-mandated payments as "reasonably incurred operating expenses for the purpose of setting" the utility's retail rates. *Id.* at 370; *see also Nantahala Power & Light Co.*, 476 U.S. 953 (rejecting a similar state effort to bar a utility from passing FERC-mandated wholesale rates through to consumers). Mississippi's prudence review was preempted because it denied full effect to the rates set by FERC, even though it did not seek to tamper with the actual terms of an interstate transaction.

As the district court recognized, *see PPL EnergyPlus, LLC*, 974 F. Supp. 2d at 831, the principles articulated in *Mississippi Power & Light Co.* apply with equal force to this dispute. If states are required to give full effect to FERC-mandated wholesale rates on the demand side of the equation, it stands to reason that they are also required to do so on the supply side. Here, the contract price guaranteed by the Generation

Order supersedes the PJM rates that CPV would otherwise earn—rates established through a FERC-approved market mechanism. The Order ensures that CPV receives a fixed price for every unit of energy and capacity it sells in the PJM auction, regardless of the market price. The fact that it does not formally upset the terms of a federal transaction is no defense, since the functional results are precisely the same. As in the above-mentioned cases, Maryland has "eroded the effect of the FERC determination and undermined FERC's exclusive jurisdiction." *Appalachian Power Co.*, 812 F.2d at 904.

Our conclusion that the Generation Order "seeks to regulate a field that the [FPA] has occupied also is supported by the imminent possibility of collision between" the state and federal regimes. *Schneidewind*, 485 U.S. at 310. While the potential for collision between the two schemes is discussed in detail in Part D, a high probability of conflict tends to suggest that Congress intended federal authority in a particular field to be uniform and exclusive. *See id.* Even if "collision between the state and federal regulation" in this case is not "an inevitable consequence," it is sufficiently likely to warrant invalidating the Maryland program "in order to assure the effectuation of the comprehensive federal regulation ordained by Congress." *N. Natural Gas Co.*, 372 U.S. at 92.

C.

Appellants argue that this court should apply a robust version of the presumption against preemption to save the Maryland scheme. *See, e.g.*, Intervenor-Appellant's Br. at 14. As its name suggests, this presumption militates against findings of federal preemption, especially in areas of traditional state authority. *See Rice v. Santa Fe Elevator Corp.*, 331

U.S. 218, 230 (1947). However, the presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). The presumption "is almost certainly not applicable here because the federal government has long regulated wholesale electricity rates." *IDACORP Inc.*, 379 F.3d at 648 n.7. Nevertheless, even were we to apply the presumption, we would find it overcome by the text and structure of the FPA, which unambiguously apportions control over wholesale rates to FERC.

Appellants emphasize the FPA's decree that FERC "shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). They contend that the Generation Order falls on the state side of the jurisdictional line, since it is designed to ensure that Maryland enjoys an adequate supply of generation capacity.

Although states plainly retain substantial latitude in directly regulating generation facilities, they may not exercise this authority in a way that impinges on FERC's exclusive power to specify wholesale rates. As the Supreme Court noted in a similar context:

> [T]he problem of this case is not as to the existence or even the scope of a State's power to [regulate generation facilities]; the problem is only whether the Constitution sanctions the particular means chosen by [the state] to exercise the conceded power if those means threaten effectuation of the federal regulatory scheme.

N. Natural Gas Co., 372 U.S. at 93. Here, Maryland has chosen to incentivize generation by setting interstate wholesale rates. This particular choice of means is impermissible. Wholesale energy prices "fixed by FERC must be given binding effect by state authorities" even "in areas subject to state jurisdiction." *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 851 (9th Cir. 2004) (internal quotation marks omitted).

Nonetheless, it is important to note the limited scope of our holding, which is addressed to the specific program at issue. We need not express an opinion on other state efforts to encourage new generation, such as direct subsidies or tax rebates, that may or may not differ in important ways from the Maryland initiative. It goes without saying that not "every state statute that has some indirect effect" on wholesale rates is preempted, *Schneidewind*, 485 U.S. at 308, for "there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market," *Nw. Cent. Pipeline Corp.*, 489 U.S. at 514. In this case, however, the effect of the Generation Order on matters within FERC's exclusive jurisdiction is neither indirect nor incidental. Rather, the Order strikes at the heart of the agency's statutory power to establish rates for the sale of electric energy in interstate commerce, *see* 16 U.S.C. § 824e(a), by adopting terms and prices set by Maryland, not those sanctioned by FERC.

D.

Appellants' position is further complicated by the fact that the principles of field and conflict preemption in this case are mutually reinforcing. As relevant here, conflict preemption applies "where under the circumstances of a particular case, the challenged

state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (internal quotation marks and alterations omitted). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Id.* "A state law may pose an obstacle to federal purposes by interfering with the accomplishment of Congress's actual objectives, or by interfering with the methods that Congress selected for meeting those legislative goals." *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 596 (4th Cir. 2005) (emphasis omitted).

In a system of "interlocking" jurisdiction, such as that created by the FPA, "[i]t is inevitable that jurisdictional tensions will arise"—even if each sovereign formally remains within the confines of its "assigned sphere." *Nw. Cent. Pipeline Corp.*, 489 U.S. at 506, 515 & n.12 (internal quotation marks and alteration omitted). "Thus, conflict-pre-emption analysis must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Id.* at 515. Here, "the impact of state regulation of production on matters within federal control is so extensive and disruptive of" the PJM markets that preemption is appropriate. *Id.* at 517-18.

As an initial matter, the Generation Order has the potential to seriously distort the PJM auction's price signals, thus "interfer[ing] with the method by which the federal statute was designed to reach its goals." *IDACORP Inc.*, 379 F.3d at 650. PJM's price signals are intended to promote a variety of objectives, including incentivizing new generation sources.

See PJM Interconnection, LLC, 132 FERC ¶ 61,173, at 61,870 (2010); *see also PPL EnergyPlus, LLC*, 974 F. Supp. 2d at 813. Market participants necessarily rely on these signals in determining whether to construct new capacity or expand existing resources. The signals appear to be serving their purpose; according to FERC, the evidence "suggests that RPM has in fact succeeded in securing sufficient capacity to meet reliability requirements for the PJM region." *PJM Interconnection, LLC*, 137 FERC ¶ 61,145, at ¶ 3 (2011).

Maryland's initiative disrupts this scheme by substituting the state's preferred incentive structure for that approved by FERC. *See PPL EnergyPlus, LLC v. Hanna*, No. 11-745, 2013 WL 5603896, at *36 (D.N.J. Oct. 11, 2013) (describing the distorting impact of a similar New Jersey program on the business decisions of private participants in the PJM auction). Two features of the Order render its likely effect on federal markets particularly problematic. First, as noted, the CfDs are structured to actually set the price received at wholesale. They therefore directly conflict with the auction rates approved by FERC. Second, the duration of the subsidy—twenty years—is substantial.

The Order is preempted for the further reason that it conflicts with NEPA, which represents an exception to PJM's otherwise steadfast commitment to a uniform market clearing price. In order to stimulate plant construction, NEPA carves out a three-year period during which certain new generators are eligible to receive a fixed price for the capacity they sell in the PJM markets. *See PJM Interconnection, LLC*, 128 FERC ¶ 61,157, at ¶ 92 (2009). CPV petitioned FERC to extend the NEPA period to ten years on the grounds

that the three-year period was insufficient to achieve its objective. *Id.* at ¶ 93. FERC rejected CPV's request, stating that "[b]oth new entry and retention of existing efficient capacity are necessary to ensure reliability and both should receive the same price so that the price signals are not skewed in favor of new entry." *Id.* at ¶ 102.

The Generation Order represents an effort by the state to directly override this explicit policy choice. As a functional matter, the CfDs extend the NEPA period for CPV to twenty years, a duration vastly exceeding the current NEPA term and double the term that CPV unsuccessfully requested FERC to institute. Maryland has sought to achieve through the backdoor of its own regulatory process what it could not achieve through the front door of FERC proceedings. Circumventing and displacing federal rules in this fashion is not permissible.

Appellants assert that no conflict is present because FERC explicitly accommodated—via the MOPR—the participation of subsidized plants in its auction. *See, e.g.*, Intervenor-Appellant's Reply Br. at 23. The fact that FERC was forced to mitigate the Generation Order's distorting effects using the MOPR, however, tends to confirm rather than refute the existence of a conflict. Furthermore, FERC's own comments on the subject belie appellants' claim that the agency has affirmatively approved the Generation Order. *See PJM Interconnection, LLC*, 137 FERC at ¶ 3 ("Our intent is not to pass judgment on state and local policies and objectives with regard to the development of new capacity resources . . . .").

As was the case with our field preemption holding, our conflict preemption ruling is narrow and focused upon the program before us. Obviously, not every state

regulation that incidentally affects federal markets is preempted. Such an outcome "would thoroughly undermine precisely the division of the regulatory field that Congress went to so much trouble to establish . . . , and would render Congress' specific grant of power to the States to regulate production virtually meaningless." *Nw. Cent. Pipeline Corp.*, 489 U.S. at 515. The Generation Order, however, is simply a bridge too far. It presents a direct and transparent impediment to the functioning of the PJM markets, and is therefore preempted.[3]

III.

For the foregoing reasons, we hold the Generation Order preempted under federal law and affirm the judgment of the district court.

AFFIRMED

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[3] Our conclusion that the Generation Order is preempted renders it unnecessary for us to reach plaintiffs' dormant Commerce Clause arguments, which were rejected by the district court. *See Schneidewind*, 485 U.S. at 311 ("Because we have concluded that Act 144 is pre-empted by the NGA, we need not decide whether, absent federal occupation of the field, Act 144 violates the Commerce Clause.").

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed June 2, 2014]

No. 13-2419 (L)
(1:12-cv-01286-MJG)

PPL ENERGYPLUS, LLC; PPL BRUNNER ISLAND, LLC; PPL HOLTWOOD, LLC; PPL MARTINS CREEK, LLC; PPL MONTOUR, LLC; PPL SUSQUEHANNA, LLC; LOWER MOUNT BETHEL ENERGY, LLC; PPL NEW JERSEY SOLAR, LLC; PPL NEW JERSEY BIOGAS, LLC; PPL RENEWABLE ENERGY, LLC; PSEG POWER LLC; ESSENTIAL POWER, LLC,

Plaintiffs - Appellees,

v.

DOUGLAS R.M. NAZARIAN; HAROLD WILLIAMS; LAWRENCE BRENNER; KELLY SPEAKES-BACKMAN; KEVIN HUGHES,

Defendants - Appellants,

and

CPV MARYLAND, LLC,

Defendant.

AMERICAN PUBLIC POWER ASSOCIATION; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; NRG ENERGY INC.; MARYLAND OFFICE OF PEOPLE'S COUNSEL; CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY; CONNECTICUT DEPARTMENT

OF ENERGY AND ENVIRONMENTAL PROTECTION; GEORGE JEPSEN, Attorney General for the State of Connecticut; CONNECTICUT OFFICE OF CONSUMER COUNSEL; NEW ENGLAND CONFERENCE OF PUBLIC UTILITIES COMMISSIONERS, INC.; MAINE PUBLIC UTILITIES COMMISSION; RHODE ISLAND PUBLIC UTILITIES COMMISSION; VERMONT PUBLIC SERVICE BOARD; VERMONT DEPARTMENT OF PUBLIC SERVICE; CALIFORNIA PUBLIC UTILITIES COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (NYPSC); PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA; DELAWARE PUBLIC SERVICE COMMISSION; NEW JERSEY BOARD OF PUBLIC UTILITIES; NEW JERSEY DIVISION OF RATE COUNSEL; MARYLAND ENERGY ADMINISTRATION; AMERICAN WIND ENERGY ASSOCIATION; THE MID-ATLANTIC RENEWABLE ENERGY COALITION,

Amici Supporting Appellants,

PJM POWER PROVIDERS GROUP; ELECTRIC POWER SUPPLY ASSOCIATION; EDISON ELECTRIC INSTITUTE,

Amici Supporting Appellees.

No. 13-2424
(1:12-cv-01286-MJG)

PPL ENERGYPLUS, LLC; PPL BRUNNER ISLAND, LLC; PPL HOLTWOOD, LLC; PPL MARTINS CREEK, LLC; PPL MONTOUR, LLC; PPL SUSQUEHANNA, LLC; LOWER MOUNT BETHEL ENERGY, LLC; PPL NEW JERSEY SOLAR, LLC; PPL NEW JERSEY BIOGAS, LLC; PPL RENEWABLE ENERGY, LLC; PSEG POWER LLC; ESSENTIAL POWER, LLC,

Plaintiffs Appellees,

v.

CPV MARYLAND, LLC,

Defendant Appellant,

and

DOUGLAS R.M. NAZARIAN; HAROLD WILLIAMS; LAWRENCE BRENNER; KELLY SPEAKES-BACKMAN; KEVIN HUGHES,

Defendants.

AMERICAN PUBLIC POWER ASSOCIATION; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; NRG ENERGY INC.; MARYLAND OFFICE OF PEOPLE'S COUNSEL; CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY; CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION; GEORGE JEPSEN, Attorney General for the State of Connecticut; CONNECTICUT OFFICE OF CONSUMER COUNSEL; NEW ENGLAND CONFERENCE OF PUBLIC UTILITIES COMMISSIONERS, INC.; MAINE PUBLIC UTILITIES COMMISSION; RHODE ISLAND PUBLIC UTILITIES COMMISSION; VERMONT PUBLIC SERVICE BOARD; VERMONT DEPARTMENT OF PUBLIC SERVICE; CALIFORNIA PUBLIC UTILITIES COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (NYPSC); PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA; DELAWARE PUBLIC SERVICE COMMISSION; NEW JERSEY BOARD OF PUBLIC UTILITIES; NEW JERSEY DIVISION OF RATE COUNSEL; MARYLAND ENERGY ADMINISTRATION; AMERICAN WIND ENERGY ASSOCIATION; THE MID-ATLANTIC RENEWABLE ENERGY COALITION,

Amici Supporting Appellant,

PJM POWER PROVIDERS GROUP; ELECTRIC POWER SUPPLY ASSOCIATION; EDISON ELECTRIC INSTITUTE,

Amici Supporting Appellees.

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed June 30, 2014]

No. 13-2419 (L)
(1:12-cv-01286-MJG)

PPL ENERGYPLUS, LLC; PPL BRUNNER ISLAND, LLC; PPL HOLTWOOD, LLC; PPL MARTINS CREEK, LLC; PPL MONTOUR, LLC; PPL SUSQUEHANNA, LLC; LOWER MOUNT BETHEL ENERGY, LLC; PPL NEW JERSEY SOLAR, LLC; PPL NEW JERSEY BIOGAS, LLC; PPL RENEWABLE ENERGY, LLC; PSEG POWER LLC; ESSENTIAL POWER, LLC,

Plaintiffs - Appellees,

v.

DOUGLAS R.M. NAZARIAN; HAROLD WILLIAMS; LAWRENCE BRENNER; KELLY SPEAKES-BACKMAN; KEVIN HUGHES,

Defendants - Appellants,

and

CPV MARYLAND, LLC,

Defendant.

AMERICAN PUBLIC POWER ASSOCIATION; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; NRG ENERGY INC.; MARYLAND OFFICE OF PEOPLE'S COUNSEL; CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY; CONNECTICUT DEPARTMENT

OF ENERGY AND ENVIRONMENTAL PROTECTION; GEORGE JEPSEN, Attorney General for the State of Connecticut; CONNECTICUT OFFICE OF CONSUMER COUNSEL; NEW ENGLAND CONFERENCE OF PUBLIC UTILITIES COMMISSIONERS, INC.; MAINE PUBLIC UTILITIES COMMISSION; RHODE ISLAND PUBLIC UTILITIES COMMISSION; VERMONT PUBLIC SERVICE BOARD; VERMONT DEPARTMENT OF PUBLIC SERVICE; CALIFORNIA PUBLIC UTILITIES COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (NYPSC); PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA; DELAWARE PUBLIC SERVICE COMMISSION; NEW JERSEY BOARD OF PUBLIC UTILITIES; NEW JERSEY DIVISION OF RATE COUNSEL; MARYLAND ENERGY ADMINISTRATION; AMERICAN WIND ENERGY ASSOCIATION; THE MID-ATLANTIC RENEWABLE ENERGY COALITION,

Amici Supporting Appellants,

PJM POWER PROVIDERS GROUP; ELECTRIC POWER SUPPLY ASSOCIATION; EDISON ELECTRIC INSTITUTE,

Amici Supporting Appellees.

No. 13-2424
(1:12-cv-01286-MJG)

PPL ENERGYPLUS, LLC; PPL BRUNNER ISLAND, LLC; PPL HOLTWOOD, LLC; PPL MARTINS CREEK, LLC; PPL MONTOUR, LLC; PPL SUSQUEHANNA, LLC; LOWER MOUNT BETHEL ENERGY, LLC; PPL NEW JERSEY SOLAR, LLC; PPL NEW JERSEY BIOGAS, LLC; PPL RENEWABLE ENERGY, LLC; PSEG POWER LLC; ESSENTIAL POWER, LLC,

Plaintiffs - Appellees,

v.

CPV MARYLAND, LLC,

Defendant Appellant,

and

DOUGLAS R.M. NAZARIAN; HAROLD WILLIAMS; LAWRENCE BRENNER; KELLY SPEAKES-BACKMAN; KEVIN HUGHES,

Defendants.

AMERICAN PUBLIC POWER ASSOCIATION; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; NRG ENERGY INC.; MARYLAND OFFICE OF PEOPLE'S COUNSEL; CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY; CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION; GEORGE JEPSEN, Attorney General for the State of Connecticut; CONNECTICUT OFFICE OF CONSUMER COUNSEL; NEW ENGLAND CONFERENCE OF PUBLIC UTILITIES COMMISSIONERS, INC.; MAINE PUBLIC UTILITIES COMMISSION; RHODE ISLAND PUBLIC UTILITIES COMMISSION; VERMONT PUBLIC SERVICE BOARD; VERMONT DEPARTMENT OF PUBLIC SERVICE; CALIFORNIA PUBLIC UTILITIES COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (NYPSC); PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA; DELAWARE PUBLIC SERVICE COMMISSION; NEW JERSEY BOARD OF PUBLIC UTILITIES; NEW JERSEY DIVISION OF RATE COUNSEL; MARYLAND ENERGY ADMINISTRATION; AMERICAN WIND ENERGY ASSOCIATION; THE MID-ATLANTIC RENEWABLE ENERGY COALITION,

Amici Supporting Appellant,

PJM POWER PROVIDERS GROUP; ELECTRIC POWER SUPPLY ASSOCIATION; EDISON ELECTRIC INSTITUTE,

Amici Supporting Appellees.

ORDER

The court denies the petitions for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petitions for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Keenan, and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. MJG-12-1286

PPL ENERGYPLUS, LLC, *et al.*
Plaintiffs

vs.

DOUGLAS R. M. NAZARIAN, in his official capacity as Chairman of the Maryland Public Service Commission, *et al.*
Defendants

MEMORANDUM OF DECISION

The Court has heard the evidence, reviewed the exhibits, considered the materials submitted by the parties, and had the benefit of the arguments of counsel.

The Court now issues this Memorandum of Decision as its findings of fact and conclusions of law in compliance with Rule 52(a) of the Federal Rules of Civil Procedure. The Court finds the facts stated herein based upon its evaluation of the evidence, including the credibility of witnesses, and the inferences that the Court has found reasonable to draw from the evidence.

I. INTRODUCTION

Prior to 1999, Maryland utilized a vertically integrated model of electric energy regulation. A single electric utility (such as BGE or Pepco) owned the

facilities that produced and delivered electricity to the users in its exclusive territory. Maryland electric power users purchased electricity from the one utility that served the territory in which they were located. The Maryland Public Service Commission ("PSC") ultimately determined whether additional generation resources were needed in Maryland and provided for the financing of those resources through the approval of rate increases.

In 1999, the Maryland General Assembly passed the Electric Customer Choice and Competition Act (the "1999 Act"), which restructured, or deregulated, Maryland's electric energy market. The 1999 Act separated the Maryland "utilities' generating assets from their distribution and transmission functions" by transferring ownership of those generation assets to other companies that owned and operated the power plants. P.391 (2007 PSC Interim Report) at 10.

The PSC is empowered by the State of Maryland to assure "safe, adequate, reasonable, and proper [electric] service." Md. Code Ann., Pub. Util. § 5-101(a). However, Maryland-based utilities, which now no longer own generating facilities, must purchase energy on federally regulated wholesale markets. Thus, the utilities and, correspondingly, Maryland ratepayers are directly affected by the wholesale prices determined on the federally regulated wholesale markets.

In mid-2000, the PSC and others began to voice concerns over the operations of Maryland's electricity markets, the post-restructuring consumer electricity rates, and the existence of adequate generation resources to serve the energy needs of Maryland ratepayers. In 2007, the PSC filed a report with the General Assembly, stating that the federally regulated

wholesale markets had not responded to Maryland's needs and opining that those markets were unlikely to respond in the immediate future to the state's "looming capacity shortage." P.391 (2007 PSC Interim Report) at 1. The PSC concluded that it should require the Maryland utilities to enter into long-term contracts to induce the construction of new electric generation facilities in Maryland.

Ultimately, on April 12, 2012, the PSC issued the Generation Order at issue,[1] directing Baltimore Gas and Electric Company ("BGE"), Potomac Electric Power Company ("Pepco"), and Delmarva Power & Light Company ("Delmarva") to enter into a Contract for Differences ("CfD") with CPV Maryland, LLC ("CPV"). In essence, the CfD provided that regardless of the price set by the federally regulated wholesale market, the Maryland utilities would assure that CPV received a guaranteed price fixed by a contractual formula.[2] The result was that CPV had a secure income stream available to finance construction of a generating facility in a designated area within Maryland.[3]

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[1] PSC Order No. 84815. *See* P.44.

[2] Ultimately, the utilities' customers.

[3] As discussed herein, there was a theoretical possibility (but a practical impossibility) that the facility could be constructed in the District of Columbia.

Plaintiffs[4] present claims in three Counts:

Count I	Violation of the Supremacy Clause, U.S. Constitution, art. VI, cl.2;
Count II	Violation of the Commerce Clause, U.S. Constitution, art. I, § 8, cl.3; and
Count III	Violation of 42 U.S.C. § 1983.

As discussed at length herein, the Court holds that Plaintiffs have established their claim that the Generation Order violates the Supremacy Clause of the United States Constitution by virtue of field preemption[5] but does not violate the dormant Commerce Clause.[6]

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[4] The Plaintiffs are: PPL Energyplus, LLC; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; Lower Mount Bethel Energy, LLC; PPL New Jersey Solar, LLC; PPL New Jersey Biogas, LLC; PPL Renewable Energy, LLC; PSEG Power, LLC; and Essential Power, LLC.

The named Defendants are the Commissioners of the PSC, sued in their official capacities, Douglas R. M. Nazarian, Harold Williams, Lawrence Brenner, Kelly Speakes-Backman, and Kevin Hughes. On January 8, 2013, after Plaintiffs filed the instant suit, Douglas R. M. Nazarian was appointed to the Maryland Court of Special Appeals.

[5] The establishment of Plaintiffs' field preemption claim renders moot the question of whether Plaintiffs also established their Supremacy Clause conflict preemption claim.

[6] The Court also holds that even if not formally abandoned, Plaintiffs' 28 U.S.C. § 1983 claim is not viable.

II. BACKGROUND

A. Electric Power Grids In A Nutshell

As once said in reference to the Rule in Shelley's case, it is one thing to put the subject of electric power grids in a nutshell, but impossible to keep it there.[7] Nevertheless, even an oversimplified, incomplete, and imprecise introduction may be useful to those totally unfamiliar with electric power grids.

To start, think of a power grid as analogous to a network of pipes utilized to transport water from various pumping stations, which take water from natural sources (lake, river, etc.), to reservoirs. The water in the reservoirs is then, as demanded by a local utility, transported by pipes in the grid to the local utility for distribution to the utility's customers.

However, for a closer analogy, think of the same grid without any reservoirs. When an amount of water is placed into the grid by a pumping station, an equal amount must flow out of the grid to a local utility. Thus, the grid operator must insure that, at all times, the supply (water put into the grid by the pumping stations) equals the demand (water sent out of the grid to the local utilities). This balance is maintained by affecting the supply through adjustments of the price paid to pumping station suppliers, payments to local utilities (or customers) to reduce their usage,

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[7] Professor Barton W. Leach wrote that when "Lord Thurlow undertook to put the Rule in Shelley's Case in a nutshell," Lord Macnaghten said, "'it is one thing to put a case like Shelley's in a nutshell and another thing to keep it there.'" W. Barton Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638, 638 n.a1 (1938) (quoting Van Grutten v. Foxwell, [1897] A. C. 658, 671).

adjustments to the price paid by the local utilities for the water they demand, etc.

B. Federal Regulation of Electric Energy

1. The Federal Power Act and FERC

In 1927, the United States Supreme Court held that the dormant Commerce Clause prohibited states from regulating the rates for wholesale power sales between utilities in different states. The Court reasoned that, unlike the regulation of the rates charged to local consumers, regulation of interstate rates places "a direct burden upon interstate commerce, from which the state is restrained by the force of the commerce clause." *Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927).[8]

In response to the *Attleboro* decision, Congress enacted the Federal Power Act ("FPA") in 1935, which "closed the '*Attleboro* gap' by authorizing federal regulation of interstate, wholesale sales of electricity—the precise subject matter beyond the jurisdiction of the States in *Attleboro*."[9] *New York v. F.E.R.C.*, 535 U.S. 1, 20 (2002). Specifically, the FPA gave the Federal Power Commission, the predecessor agency to FERC, jurisdiction over the regulation of interstate wholesale sales of electricity and of interstate transmissions of electric energy. *See* 16 U.S.C. § 824(a); *New York*, 535 U.S. at 20-21.

The FPA vested FERC with the responsibility for setting the "rates and charges" of wholesale electric energy and for ensuring that those rates are "just and

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[8] *See Quill Corp. v. N.D. By & Through Heitkamp*, 504 U.S. 298 (1992) (recognizing abrogation of *Attleboro* on other grounds).

[9] The "'sale of electric energy at wholesale' means a sale of electric energy to any person for resale." 16 U.S.C. § 824(d).

reasonable." *Id.* § 824d(a); *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47-48 (2003). In essence, FERC exercises this authority through an intricate regulatory framework whereby transactions for the wholesale sale of electricity are filed with FERC (on either an individual basis or, more often, under a market-based rate tariff). FERC determines on its own initiative, or in response to a request by some party, whether such rates are "just and reasonable" and not unduly preferential, discriminatory, or disadvantageous to any party.[10] *See* 16 U.S.C. § 824e; *id.* § 824d.

As to the physical facilities that generate electric energy, the FPA gave FERC jurisdiction over all facilities for [the] transmission or sale of electric energy" in interstate commerce. *Id.* § 824(b)(1). But, "except as specifically provided in this subchapter and subchapter III of this chapter," FERC has no jurisdiction over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." *Id.*

The witnesses generally agreed that FERC has no authority or power to order directly the siting, building, or construction of a generation facility generally or in any particular location within a state. Tr. Mar. 5 (PM) at 82:4-21 (Nazarian); Tr. Mar. 6 (AM) at 44:1-21, 46:12-47:7 (Massey); Tr. Mar. 7 (AM) at

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[10] For example, FERC regulations require utilities with market-based rate authority to file an Electronic Quarterly Report ("EQR") every quarter summarizing the contractual terms and conditions in agreements subject to the jurisdiction of FERC, including agreements for the wholesale sales of capacity and energy. *See* 18 C.F.R. § 35.10b.

32:10-21 (Wodyka). As discussed *infra*, that authority is retained by the states under the FPA.

The FPA created an exclusive area of federal jurisdiction in the electric energy realm regarding the regulation of interstate wholesale energy sales and transmission, including the entities that engage in such acts. The FPA also retained a sphere of state jurisdiction with respect to interstate retail sales, distribution of electric energy, and the construction of local generation facilities. *See New York*, 535 U.S. at 22-23 (explaining the legislative history [of the FPA] is replete with statements describing Congress' intent to preserve state jurisdiction over local facilities").[11] As summarized by the U.S. Court of Appeals for the District of Columbia Circuit:

> Jurisdiction over this sale and delivery of electricity is split between the federal government and the states on the basis of the type of service being provided and the nature of the energy sale . . . . Thus transmission occurs pursuant to FERC-approved tariffs; local distribution occurs under rates set by a state's public service commission.

Niagara Mohawk Power Corp. v. F.E.R.C., 452 F.3d 822, 824 (D.C. Cir. 2006).

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[11] Also recognizing the role of the states, the Energy Policy Act of 2005, which gave FERC jurisdiction over reliability standards for the bulk-power system, states "[n]othing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard." 16 U.S.C. § 824o(i)(3).

2. Development of Wholesale Energy Markets

a. Traditional Vertically Integrated Utilities

When Congress enacted the FPA, networks of high-voltage, long-distance transmission lines which today crisscross the United States" simply did not exist." *See Transmission Access Policy Study Grp. v. F.E.R.C.*, 225 F.3d 667, 691 (D.C. Cir. 2000), *aff'd sub nom. New York v. F.E.R.C.*, 535 U.S. 1 (2002). The absence of this infrastructure likely was a factor in the development of the vertically integrated structure of electric utilities that generally predominated in the United States until the 1990's. The term "vertically integrated electric utilities" refers to "generation, transmission, and distribution facilities [which are] owned by a single entity and sold as part of a bundled service (delivered electric energy) to wholesale and retail customers." Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities; Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, 60 Fed. Reg. 17,662, 17,668 (Apr. 7, 1995) (hereinafter Open Access). Under the vertically integrated structure:

> Most electric utilities built their own power plants and transmission systems, entered into interconnection and coordination arrangements with neighboring utilities, and entered into long-term contracts to make wholesale requirements sales (bundled sales of generation and transmission) to municipal, cooperative, and other investor-owned utilities (IOUs) connected to each utility's

> transmission system. Each system covered limited service areas.

Id.

A utility operating in the vertically integrated structure typically generates electricity with power plants it owns; transmits the electricity from those power plants to its service territory, usually defined by the state of location;[12] and distributes that electricity to end-use customers within its service territory through local distribution networks, poles, and wires that the utility owns and maintains. *See* Tr. Mar. 4 (AM) at 121:14-122:21 (Alessandrini); Tr. Mar. 4 (PM) at 8:23-10:20 (Carretta); Tr. Mar. 6 (AM) at 11:8-20 (Massey).

Where utilities operated in a vertical integration structure, states often controlled the fiscal feasibility of a utility's plans to expand its existing generation facilities or to construct new power plants through a regulatory framework. Thus, state regulators could decide whether to allow an increase in the retail rate charged by the utility to end-use customers sufficient to permit the utility to recover the cost of financing the construction of new generation facilities or the development of existing facilities. *See* Tr. Mar. 4 (AM) at 121:14-122:25 (Alessandrini). If the state approved an adequate increase in retail rates, then the utility acquired a financial guarantee that assisted the utility in raising capital for its generation projects. *See id.*

When most electric utilities were vertically integrated one-stop shops with monopolies over

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[12] Typically, a utility was granted a franchise by the state government to provide electric service to all consumers located within a defined territory or service territory. *See* Tr. Mar. 5 (AM) at 42:13-44:11 (Nazarian).

designated service territories, the electric energy industry operated predominately as a retail market subject to state regulation without significant intervention from the federal government. *See* Tr. Mar. 4 (AM) at 121:14-122:26 (Alessandrini). In this scenario, the "wholesale market"[13] regulated by FERC consisted primarily of transactions between vertically integrated utilities whose service territories were physically situated near each other. Tr. Mar. 6 (AM) 13:3-16 (Massey).

b. FERC's Fostering of Wholesale Energy Markets

In the 1970's and 1980's, significant "[t]echnological improvements . . . made feasible the transmission of electric power over long distances at high voltages." *See Transmission Access*, 225 F.3d at 681 (D.C. Cir. 2000). In response to, among other things, advancements in technology, the wholesale electricity market began to blossom producing, *inter alia*, independent and non-utility owned power plants capable of providing competitively priced generation to the wholesale market. *See id.* With a burgeoning wholesale market came more federal legislation and regulation. For instance, in 1978 Congress passed the Public Utility Regulatory Policies Act ("PURPA"), which called for "a program to improve the wholesale distribution of electric energy" and the reliability of electric service." 16 U.S.C. § 2601(2). However, the traditional vertically integrated utilities that owned transmission lines were inhibiting the development of this wholesale electricity market by "deny[ing] alternative producers access to their transmission

[13] Such as the market was in those days.

lines on competitive terms and conditions." *Transmission Access*, 225 F.3d at 682.

Congress and FERC took action during the 1990's to facilitate the development of wholesale power markets by "opening up transmission services" and reducing the ability of vertically integrated public utilities to deny customers access to competitively priced electric generation. *See* Open Access, 60 Fed. Reg. at 17,663-64. "[I]n 1992, Congress enacted the Energy Policy Act, which amended sections 211 and 212 of the FPA to authorize FERC to order utilities to 'wheel' power—*i.e.*, transmit power for wholesale sellers of power over the utilities' transmission lines—on a case-by-case basis." *Transmission Access*, 225 F.3d at 682 (citing Energy Policy Act of 1992, Pub. L. No. 102-486, §§ 721-22, 106 Stat. 2776 (codified at 16 U.S.C. §§ 824j-k) (giving non-utility generators the right to have FERC order transmission-owning utilities to interconnect and obtain access to the local utilities' delivery systems)).[14] In 1996, FERC issued Order No. 888, which "ordered the national deregulation of electricity transmission services" and required all public utilities that owned or controlled transmission facilities to provide open access to their transmission lines on the same basis on which they provide access to themselves. *See Sacramento Mun. Util. Dist. v.*

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[14] Additionally, in 2005 Congress passed the Energy Policy Act of 2005, which made FERC responsible for system reliability standards for the bulk-power system. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1211(a), 119 Stat. 594, 941 (codified at 16 U.S.C. § 824o); Mandatory Reliability Standards for the Bulk-Power System, 72 Fed. Reg. 16,416 (Apr. 4, 2007). Prior to enactment of the Energy Policy Act, the nation's bulk-power system depended on participants' voluntary compliance with industry standards." *Alcoa Inc. v. F.E.R.C.*, 564 F.3d 1342, 1344 (D.C. Cir. 2009).

F.E.R.C., 616 F.3d 520, 523 (D.C. Cir. 2010) (internal quotation marks omitted).

In a further effort to facilitate the development of competitive wholesale power markets and to "increase the efficiency of the electric transmission systems," FERC "strongly encouraged the [electric power] industry to organize itself into Regional Transmission Organizations" ("RTOs"). *See generally* Delmarva Power & Light Co., 106 FERC ¶ 61,290, 62,080 (2004); Tr. Mar. 6 (AM) at 48:7-11 (Massey). RTOs are voluntarily formed independent entities that have "consolidate[ed] control of all transmission services in a particular region" and that provide a platform for regional wholesale power markets. *See Braintree Elec. Light Dep't v. F.E.R.C.*, 550 F.3d 6, 8 (D.C. Cir. 2008); Tr. Mar. 6 (AM) 14:20-15:8, 48:3-11 (Massey); Tr. Mar. 6 (PM) at 5:6-6:1 (Wodyka). FERC explained that such consolidation of control in particular regions was needed because "traditional management of the transmission grid" by vertically integrated electric utilities was inadequate to support the efficient and reliable operation that is needed for the continued development of competitive electricity markets." Regional Transmission Organizations, 65 Fed. Reg. 810, 811 (Jan. 6, 2000). According to FERC, despite Order No. 888, opportunities still existed "for transmission owners to unduly discriminate in the operation of their transmission systems so as to favor their own or their affiliates' power marketing activities," which could in turn impede competitive electricity markets. *Id.* at 817.

In 2000, FERC issued Order No. 2000 requiring "utilities that own, operate, or control interstate transmission facilities either to file a proposal to participate in an RTO or to describe their efforts

toward joining one." *Me. Pub. Utils. Comm'n v. F.E.R.C.*, 454 F.3d 278, 280 (D.C. Cir. 2006); 18 C.F.R. § 35.34(a). FERC's stated purpose entailed "promoting efficiency and reliability in the operation and planning of the electric transmission grid and ensuring non-discrimination in the provision of electric transmission services." 18 C.F.R. § 35.34(a). FERC defined the required functions of any formed RTO as including, *inter alia*: (1) "employ[ing] a transmission pricing system that will promote efficient use and expansion of transmission and generation facilities" and (2) "ensur[ing] the development and operation of market mechanisms to manage transmission congestion." *Id.* § 35.34(k) (1)-(2). An RTO "manage[s] all the accounting for the energy that's put in and taken out of the transmission system it oversees, "operate[s] all the different pricing and biding mechanisms that fall under those wholesale market structures," and operates and plans the regional transmission system within its area. Tr. Mar. 5 (AM) at 126:20-127:18 (Nazarian).

To constitute an RTO, an entity has to satisfy certain requirements and have its proposal approved by FERC. A FERC-approved RTO operates pursuant to tariffs filed with, and approved by, FERC. *See* Tr. Mar. 5 (AM) at 126:22-127:6 (Nazarian). Presently, "[RTOs] exist in about two-thirds of the country" and are thus responsible for "about two-thirds of the load" or power consumption in the United States. Tr. Mar. 6 (AM) at 19:21-20:16 (Massey). As relevant hereto, all of Maryland is part of an RTO formed in 2002,

operated and administered by PJM Interconnected, LLC[15].

C. PJM Interconnected, LLC ("PJM")

After issuance of Order No. 2000, PJM organized itself into an RTO, receiving full RTO status from FERC in December 2002. Although PJM operates as an RTO under the control of FERC, PJM is a private entity with 750 members or stakeholders, including "parties that own facilities, or buy or sell power in the PJM region." Tr. Mar. 6 (PM) at 11:16-12:3 (Wodyka); *see also* P.606 (PSC Order No. 81423) at 42. PJM's members include "power generators, transmission owners, distributors, marketers, and large consumers." P.606 (PSC Order No. 81423) at 42. States are not members or stakeholders of PJM. *See id.*

The PJM area encompasses the District of Columbia and all or parts of 13 states (collectively the "PJM region").[16] The PJM region, *i.e.*, PJM's geographic footprint, consists of about 18 interconnected transmission zones. A transmission zone is the area or territory in which a particular utility, such as Baltimore Gas & Electric ("BGE"), owns transmission lines or resources. A transmission zone generally mirrors the utility's historical service territory, discussed *supra*. *See* Pls.' Dem. 16. The PJM region

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[15] PJM (Pennsylvania, Jersey, Maryland) traces its origins back to 1927 when three traditional utilities in Pennsylvania, New Jersey, and Maryland formed a power pool. *See* Tr. Mar. 6 (PM) at 10:9-23, 17:3-9 (Wodyka).

[16] As part of organizing into an RTO, the transmission resources in the PJM region were unified through the voluntary agreement of the owner-utilities of those resources. Logistically, the owner-utilities "transferred operational control of their transmission lines to the PJM Interconnection," but still retained equity ownership. Tr. Mar. 6 (AM) at 14:24-15:8 (Massey).

has an aggregate population of approximately 60 million people, covers 214,000 square miles, and includes 1,365 electric generators that are connected to PJM's regional transmission system. P.516 (PJM—At a Glance) at 3; Pls.' Dem. 16.

As an RTO:

> PJM is responsible for the coordination and operation of the electric power system across the entire PJM footprint. They also then design and administer competitive markets to support the operations and activities within the, again, PJM RTO region. And finally they do . . . resource adequacy planning to ensure that appropriate generation and transmission resources are available to serve the load requirements across the PJM region. And they do this in a way that they try to ensure the safety and reliability of all the activities that occur in the PJM footprint.

Tr. Mar. 6 (PM) at 10:25-11:10 (Wodyka).

As a FERC-approved RTO, PJM carries out its responsibilities under FERC's jurisdiction and pursuant to FERC-approved tariffs, including the Open Access Transmission Tariff (the "PJM Tariff"), which governs broadly how PJM operates the regional transmission system in the PJM region. P.516 (PJM—At a Glance) at 4. Additionally, PJM executes its duties through agreements with other parties that are filed with, and approved by, FERC, including the Transmission Owners Agreement ("TOA"), the Reliability Assurance Agreement ("RAA"), and the

Operating Agreement.[17] Tr. Mar. 6 (PM) at 25:5-19 (Wodyka); P.516 (PJM—At a Glance) at 4.

1. PJM's Operation of the Bulk-Power System and Transmission Planning

One aspect of PJM's duties as an RTO is the day-to-day operation and maintenance of the bulk electric power system to ensure reliability of electricity delivery across the [PJM] region." Tr. Mar. 4 (AM) at 37:20-38:16 (Alessandrini). Thus, PJM operates and maintains a regional interconnected transmission system and power grid that spans the PJM footprint, enabling electric energy to be dispatched and delivered to various points across the PJM region. *See PJM Interconnection, LLC*, 132 FERC ¶ 61,173, 61,869-70 (2010); *see also* Tr. Mar. 5 (AM) at 127:7-18 (Nazarian). PJM can be thought of as analogous to an "air traffic controller[] of the power grid" because it "monitors and coordinates . . . electric generators, . . . high-voltage transmission lines, . . . substations," and the flow of electric energy therein on a day-to-day basis. P.516 (PJM—At a Glance) at 1.

PJM is responsible for planning for the regional transmission system it oversees to ensure resource adequacy and future system reliability. To that end, PJM evaluates whether, and to what extent, new transmission resources or improvements to existing transmission resources are necessary to meet the

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[17] The RAA, which is "signed by all the load-serving entities ['LSEs'] in the PJM region," contains provisions related to the amount of capacity resources that must be procured by each LSE. P.516 (PJM—At a Glance) at 4; *see also* Tr. Mar. 6 (PM) at 131:2-132:10 (Wodyka). "The Operating Agreement must be signed by organizations to become members of PJM." P.516 (PJM—At a Glance) at 4. It "establish[es] how PJM operates as a regional transmission organization." *Id.*

requirements of the load in the future." Tr. Mar. 4 (AM) at 38:12-16 (Alessandrini). For example, "PJM conducts a long-range Regional Transmission Expansion Planning (RTEP) process that identifies what changes and additional to the grid are needed to ensure reliability and the successful operation of the wholesale markets."[18] P.516 (PJM—At a Glance) at 2; *see also* Tr. Mar. 6 (AM) at 20:21-24 (Massey). The RTEP includes long-term planning studies that look into the future as far as 15 years . . . to evaluate the performance of the transmission as well as the generation system that's going to be able to reliably serve load in the long run." Tr. Mar. 6 (PM) at 22:10-21 (Wodyka).

2. PJM-Administered Wholesale Electricity Markets

In addition to managing the physical flow of electric energy across the interstate transmission system within the PJM region and planning for improvements to ensure infrastructure reliability, PJM administers three wholesale markets[19] in which electric energy

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[18] PJM does not "own" the transmission resources within the PJM region. Instead, it manages and operates those resources through an interconnected bulk-power system. *See* Tr. Mar. 6 (AM) at 15:5-8 (Massey). As a result of the TOA, a FERC-filed agreement, the transmission resource owners who wish to be part of the PJM region are obligated to perform certain transmission projects identified by PJM in its RTEP. All utilities that own transmission resources within the PJM region and wish to be part of the RTO must enter into the TOA. *See* P.516 (PJM—At a Glance) at 4.

[19] As explained *supra*, the FPA charges FERC with the regulation of interstate wholesale sales of electricity. *See* 16 U.S.C. § 824(a). Pursuant to the FPA, FERC has the power to set and regulate wholesale electric energy "rates and charges," subject to the requirement that such rates or charges shall be just

products are sold by capacity resources to PJM and then resold by PJM to Load Serving Entities ("LSEs"[20]) according to prices set in each of the respective markets. Only two of these markets, the energy market and the capacity market, are pertinent to the instant case. The third wholesale market, the ancillary services market,[21] is not. Therefore, the term "PJM Markets" as used herein refers to the energy and capacity markets collectively and excludes the ancillary services market.

The PJM Markets are run pursuant to FERC-approved tariffs and are the mechanisms that PJM uses to set or determine the price at which energy and capacity are to be bought and sold within its territory. Transactions on the PJM Markets are not the only permissible FERC-regulated wholesale transactions. Private parties can buy and sell wholesale energy, capacity, and ancillary services outside the PJM Markets and thus outside the prices set by PJM in such markets. *See* OPC's Post-Trial Br. [Document 140] at 21. For instance, subject to FERC rules, a capacity resource, such as a generation facility, may

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and reasonable." *Id.* § 824d(a); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 373 (1988). It is pursuant to this power that FERC authorizes PJM to run the PJM wholesale markets, setting the price for wholesale electricity sales through market-based auctions.

[20] "LSE" refers to an entity that serves an energy demand by purchasing wholesale energy for purposes of resale to end-use customers who are actually using and consuming that energy, such as homes and businesses. Tr. Mar. 5 (AM) at 48:22-51:21 (Nazarian); Tr. Mar. 11 (AM) at 41:1-7 (Roach).

[21] "Ancillary Service Markets are markets for so-called reliability services that are necessary in realtime [sic] to keep the system perfectly in balance." Tr. Mar. 6 (AM) at 18:14-16 (Massey).

sell energy and capacity directly to an LSE through a bilateral contract at a price determined by the parties, not set by PJM through its market-based mechanisms. *See* Tr. Mar. 5 (AM) at 16:21-17:9 (Nazarian).

Irrespective of the transactional means used by an LSE to procure energy for resale to end-use customers, the costs incurred by the LSE for wholesale purchases are passed on to end-use customers through the retail rate charged by the LSE. *See Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 372 (1988) ("States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates."). Thus, an increase in wholesale rates tends to result in a corresponding increase in retail rates.

a. PJM Wholesale Energy Market

The PJM wholesale energy market is a market in which wholesale electric energy generated by power plants is bought and sold to meet present load demand within the PJM region (the "PJM Energy Market"). In the PJM Energy Market, generation resources[22] sell energy to PJM that is generated and delivered into PJM's interconnected power grid by the generator. LSEs then purchase that energy from PJM to deliver and resell it to end-use customers, thereby satisfying load or customer demand for electricity at any point in time. Tr. Mar. 4 (AM) at 23:16-24, 37:20-38:6 (Alessandrini). Because generators sell their energy to PJM, and LSEs purchase that energy from PJM and receive delivery through PJM's interstate grids and transmission systems, there is no direct sale of energy from a generator to a particular LSE. Thus, the PJM

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[22] The term "generation resources" refers to resources or facilities within PJM that generate electric energy such as power plants.

Energy Market is composed of two separate sub-markets—day-ahead and real-time. In the day-ahead sub-market, generation facilities bid into an energy market for energy delivery in the next twenty-four hours; in the real-time sub-market, generation resources bid into a market for delivery in the next hour. *See* Tr. Mar. 6 (AM) at 18:4-19:12 (Massey).

With respect to setting the price of energy in the PJM Energy Market, PJM uses a system called "Locational Marginal Pricing [('LMP')], which is the economic dispatch and price setting of energy." Tr. Mar. 4 (AM) at 24:22-24 (Alessandrini). The concept of LMP is that it "reflects the value of the energy at the specific location and time it is delivered" and "takes into account the effect of actual operating conditions on the transmission system in determining the price of electricity at different locations in the PJM territory." P.516 (PJM—At a Glance) at 11. LMP may result in different prices for energy in different zones or locations within the PJM region. These "[e]nergy prices vary across the PJM footprint according to a number of factors that differentiate energy prices at different points within the system." P.391 (2007 PSC Interim Report) at 17; *see also* Tr. Mar. 4 (AM) at 114:11-25 (Alessandrini). LMP for energy is "volatile" because it depends on the value of that energy, where it's produced, at the time it's produced, and what the weather and other conditions are."[23] Tr. Mar. 5 (PM) at 65:21-66:6 (Nazarian).

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[23] FERC describes the LMP as:

> a bid-based, security-constrained economic dispatch and unit commitment model to determine real-time and next-day LMP for electricity, which reflect the value of energy at a specific location and time it is delivered. If the lowest-priced electricity can reach all

Concerning the prices received by power plants for energy sold into the PJM Energy Market, generation facilities across the PJM region have the ability to bid electric energy into the PJM Energy Market at a bid price. PJM, as the operator of the power grid, dispatches that energy to meet load demand by taking generation bids in ascending order of cost (*i.e.*, beginning with the lowest cost generation and ending with the highest cost generation) "until the electric load is satisfied." P.391 (2007 PSC Interim Report) at 17. The highest cost generation (that is, the cost at the point at which the load demand is satisfied) "set[s] the clearing price for all [generators] operating in the zone," and the resulting price is the LMP received by those generation resources. *Id.*

> One factor that influences LMPs significantly is the extent, or lack, of transmission capability into a state or region [because w]hen transmission lines are 'congested' or 'constrained,' *i.e.*, they cannot carry the lower cost electricity to meet demand, PJM must dispatch more expensive generation located in the constrained zone, which increases LMPs.

Id. That is, if lower cost generation cannot be dispatched to serve load in a particular zone due to limitations in transporting the energy, PJM "skips" it and dispatches higher cost generation, which results

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> locations, prices differ at the approximately 8,000 pricing nodes on the transmission system by marginal losses only. When transmission congestion prevents the free flow of energy, more expensive electricity is ordered to meet that demand, and the LMP is higher in congested areas.

PJM Interconnection, LLC, 132 FERC 1 61173, 61,870 (2010).

in "congestion costs" and higher LMPs paid by the purchasing LSE and corresponding increases in the retail energy rates for the end-use customers served by the LSE. *See id.* at 17-18; *see also* Tr. Mar. 4 (AM) at 116:6-118:1 (Alessandrini); Tr. Mar. 8 (AM) at 93:20-94:19 (Willig). Thus, higher LMPs provide higher revenues to generation facilities.

According to PJM, the LMP pricing model:

> give[s] price signals that encourage new generation sources to locate in areas where they will receive higher prices. It signals large new users to locate where they can buy lower-cost power. It also encourages the construction of new transmission facilities in areas where congestion is common, in order to reduce the financial impact of congestion on electricity prices.

P.516 (PJM—At a Glance) at 11; *see also* Tr. Mar. 8 (AM) at 94:16-19 (Willig) ("If the LMPs are different at . . . two points, it means there's . . . differential value to resources located at those two points."). The Maryland Public Service Commission ("PSC") has opined that LMPs do not work as intended, in part because they "have not yielded adequate new generation inside Maryland's transmission constraints." P.391 (2007 PSC Interim Report) at 18-19. The PSC noted that as a "result[,] Marylanders have paid and will continue to pay higher prices than others in the PJM region due to our higher LMPs, but no new material generation has been built in recent years." *Id.* at 19.

b. PJM Wholesale Capacity Market

PJM administers a wholesale capacity market (the "PJM Capacity Market"), which is a forward market

where a product called "capacity" is sold by a capacity resource to PJM and then resold by PJM to LSEs. Capacity resources include generators that will increase the energy supply and users that will reduce the energy demand. LSEs purchase capacity to meet their capacity obligations under certain FERC-filed agreements with PJM. As in the PJM Energy Market, capacity resources sell capacity to PJM; there is no direct sale of capacity from a capacity resource to a particular LSE.

PJM sets the price for capacity bought and sold in the PJM Capacity Market through application of the Reliability Pricing Model ("RPM"). The RPM establishes an annual Base Residual Auction ("BRA") through which PJM procures capacity from capacity resources "for a particular 'power year'" three years after the auction. That is, capacity bid in the 2012 BRA will be made available for the 2015/2016 power year. The BRA determines the market clearing price, which is the price that PJM will pay for all capacity that clears the BRA. P.391 (2007 PSC Interim Report) at 19. Generally speaking, increases in capacity prices lead to increases in the retail rates paid by end-use customers.

(i) "Capacity"

"Capacity," as used herein to refer to a product,[24] is a standby commitment made by a capacity resource to either produce electric energy or to consume less

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[24] Throughout the trial, witnesses referred to capacity as both a product bought and sold in the PJM Capacity Market and, more generally, as the mega-watt capability of existing resources, *i.e.*, how much electric energy an existing generation facility (or facilities) is capable of producing at any point in time. Herein, the Court refers to capacity as the product.

electric energy at a time in the future when called upon by PJM to do so. *See Conn. Dep't of Pub. Util. Control v. F.E.R.C.*, 569 F.3d 477, 479 (D.C. Cir. 2009). "In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself." *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 168 (2010). Accordingly, the purchase of capacity is the purchase of a capacity resource's *availability* either to supply energy into PJM's interconnected transmission grid or to reduce the demand for electric energy on the transmission system at some defined future time. Tr. Mar. 8 (AM) at 11:11-12:21 (Willig). A purchase of capacity is not a purchase of actual electric energy, but is instead a purchase of a resource capable of producing, or reducing demand for, electric energy in the transmission system when requested.[25] *Id.*

Capacity resources take various forms. The most typical form is generation capacity, which is a generation resource's commitment to generate actual electric energy into the transmission system operated by PJM that can then be dispatched to serve load at some future point, if and when called upon to do so. *See id.* at 11:11-18. Any type of power plant (*e.g.*, nuclear, natural gas, coal, wind farm, solar) is a generation resource. Capacity resources can also take the form of demand reduction or energy efficient programs. Unlike generation resources that take place on the energy supply side of the market, "demand response" programs occur on the energy demand side

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[25] Therefore, a capacity resource that clears the BRA is paid by PJM for that capacity irrespective of whether PJM actually calls upon the resource in the future to generate actual energy into the transmission system or to refrain from doing so.

of the market and represent a commitment by an LSE to reduce the demand for energy on the transmission system when called upon to do so. The ability of an LSE to reduce demand generally involves an agreement by end-use customers to reduce demand during peak periods at the request of the LSE in return for compensation. Under the RPM, generation and demand reduction resources bid into the BRA as "capacity."

"Capacity is an important concept in the energy market due to the substantial deviations between maximum energy demand and minimum energy demand." *PPL Energyplus, LLC v. Solomon*, No. 11-745, 2012 WL 4506528, at *1 (D.N.J. Sept. 28, 2012) (citing U.S. Dep't of Energy, *A Primer on Electric Utilities, Deregulation, and Restructuring of U.S. Electricity Markets*, at A.4 (2002), http://www1.eere.energy.gov/femp/pdfs/primer.pdf)). The purchase and sale of capacity ensures that at any given time there are adequate resources capable of supplying energy to serve forecasted load, as well as a reserve margin to meet exigent circumstances, such as an unexpectedly high demand or the failure of a generator. *See* Tr. Mar. 8 (AM) at 11:4-12:7 (Willig). As explained by Professor Willig:

> If there is capacity in the market, and there is need for the energy, then that capacity is utilized, the physical cast is turned on. However, sometimes capacity is available, but it's not actually used. If the capacity isn't there, then it can't be used, but if it's there, then it could be used if it's needed.

Id. at 12:8-14.

In addition to the general benefits of ensuring an adequate amount of capacity to satisfy load demand, a capacity market benefits capacity resources because capacity sales are a source of revenue. In particular, a generator that clears capacity in the BRA run by PJM in a year (for example, 2012) will have a fixed stream of revenue for one-year period three years in the future (for example, from 2015 to 2016). This fixed stream of revenue is significant because it can enable the generator to obtain current financing essential to its ability to deliver capacity in the future.

(ii) Capacity Obligations Within the PJM Region

Pursuant to the RAA with PJM, each LSE must satisfy certain "Capacity Obligations."[26] *See* P.76 (PJM RAA Agt.) at 34. The RAA's stated purpose is to ensure that adequate Capacity Resources . . . will be planned and made available to provide reliable service to loads within the PJM Region." *Id.* at 23. To effect this purpose, the RAA sets forth a comprehensive process pursuant to which PJM determines the total amount of generating capacity needed within the PJM region and, based on that calculation, creates capacity obligations for each LSE. *See id.* at 90-115. To determine the total amount of capacity needed in a future delivery year, PJM calculates the "amount of capacity needed to meet the forecasted load" and adds to it "reserves adequate to provide for the unavailability of Generation Capacity Resources, load forecasting uncertainty, and planned and maintenance outages." *See id.* at 34. The reserve margin is computed as a percentage and applied to the load

[26] The RAA requires any LSE within the PJM region to become and remain a party to the agreement.

forecasts to determine the total amount of capacity required to serve reliably the forecasted load in the PJM region. Tr. Mar. 6 (PM) at 33:7-34:17 (Wodyka).

Once PJM determines the total amount of capacity needed, it divides responsibility for procuring that amount among the LSEs within the PJM region. *Id.* at 25:24-32:9. Capacity obligations can be satisfied by generation or demand resources, as discussed *infra*. An LSE can satisfy its capacity obligations by a combination of the following actions:

1. Designating its own generation or demand resources;
2. Entering into a bilateral contract with a capacity resource with the parties to the agreement determining the price for capacity; and/or
3. Being assigned capacity in the BRA, PJM's annual capacity auction, which determines the price for capacity through application of the RPM.

P.516 (PJM—At a Glance) at 9-10.

In lieu of the above actions, an LSE may elect the Fixed Resource Requirement ("FRR") under the PJM Tariff. Pursuant to the FRR, the LSE, in essence, removes its load or energy demand from PJM. To use the FRR option, the LSE must demonstrate that it can satisfy its share of the total capacity obligation through individual bilateral agreements with capacity resources or through the generation of electricity from its own facilities. Tr. Mar. 4 (AM) at 82:2-20, 124:22-125:15 (Alessandrini); Tr. Mar. 6 (PM) at 16:19-24 (Wodyka).

(iii) PJM's FERC-approved RPM

In 2006, FERC adopted and approved PJM's RPM for operating a wholesale capacity market and implementing a competitive capacity auction process. The RPM sets forth the terms and conditions governing the sale and delivery of capacity through the annual BRA including the manner by which capacity is offered into the auction, how the clearing price of capacity is determined, how capacity resources are paid for cleared capacity, and the penalties for failure to deliver capacity that clears the auction. Tr. Mar. 4 (AM) at 32:12-13, 37:23-38:2 (Alessandrini); Tr. Mar. 4 (PM) at 8:16-17 (Carretta); Tr. Mar. 4 (PM) at 104:25-106:16 (Cudwadie). Ultimately, the RPM encompasses the method by which PJM sets the price of capacity that is offered into and clears the BRA.[27] In each BRA, PJM seeks to procure a target capacity reserve level for the RTO in a least cost manner while also taking into account locational constraints.

PJM is the buyer in the BRA, and the capacity resource is the seller. To sell successfully capacity to PJM in the BRA, a capacity resource must bid or offer an amount of capacity at a price, and the bid must be partially or fully selected in or clear the BRA. When a capacity bid clears the BRA, the seller becomes obligated to sell the cleared amount of capacity to PJM at the market clearing price. The market clearing price is determined in reference to all of the capacity bids (and the corresponding bid prices) submitted in

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[27] As discussed *supra*, a capacity resource may sell its capacity outside of the BRA, meaning at a price that is not set pursuant to the RPM. Additionally, even if a generation resource does not clear capacity in the BRA, that resource may still sell its electric energy in the PJM Energy Market or in some other FERC-approved manner. *See* Tr. Mar. 8 (AM) at 13:21-14:2 (Willig).

the BRA. *See* Tr. Mar. 8 (AM) at 16:22-17:5 (Willig). As discussed in more detail *infra*, the market clearing price is the bid price at which demand, as determined by PJM, is fully supplied. All resources that offer capacity in the BRA at or below the market clearing price generally will clear the BRA and, as a result, receive the market clearing price for the offered capacity. *See id.* at 16:9-17:5.

(1) Bidding in the BRA

To bid into the BRA, a capacity resource must submit an offer consisting of: (1) an amount of capacity the bidder is willing to sell for one year to be delivered beginning three years after the BRA and (2) a bid price for the amount of capacity offered. *Id.* at 29:9-11. Capacity is measured and offered in megawatt-days ("MW-day"), and the bid price is a dollar amount per MW-day ("$/MW-day"). *See id.* at 29:9-12. For instance, a power plant that bids 100 MW-days of capacity at $25 into the 2012 BRA, is offering its availability to deliver up to 100 MW of electric energy each day for one year beginning in 2015 (three years after the auction), at a minimum price of $25/MW-day. *See generally* Tr. Mar. 7 (AM) at 138:19-139:9 (Knight). Hence, if the power plant's bid clears the BRA in its entirety, the power plant will receive that year's clearing price—which may be more than $25/MW-day—for 100 MW-days of capacity during the delivery year beginning in 2015.

A capacity resource generally may select whatever price it wishes in $/MW-day when bidding capacity into the BRA, subject only to the Minimum Offer Price Rule ("MOPR") and a bid ceiling or cap. For example, if a generator is considering an uprate to an existing generation resource that would increase the amount of energy it can output into PJM's interconnected grid,

thus increasing its capacity, the generator may price its bid into the BRA at an amount sufficient to recover the uprate costs not gained back through anticipated energy sale revenue. *See id.* at 129:21-131:5. If the generator clears the BRA at that price, it will go forward with the uprate, but if it does not clear, it will not. *See id.* at 129:9-130:7; *see also* Tr. Mar. 8 (AM) at 15:15-17:5 (Willig) (describing a "well-functioning" capacity market as discouraging uneconomic development). However, bidding or bid prices are not necessarily connected directly to an immediate development decision. They may instead be chosen by virtue of the view that getting anything for capacity is better than nothing. That is, an existing capacity resource not subject to the MOPR can bid into the BRA at $0/MW-day. This is referred to as "price taking." *See* Tr. Mar. 7 (PM) at 68:3-19 (Knight). PJM has reported that in some BRAS, 80% of the participants bid zero. *Id.* at 68:19. A bid of $0/MW-day ensures that the offered capacity will clear the BRA and will yield a payment more than zero, unless every bidder bids zero. A price taker will accept whatever the market clearing price happens to be in that BRA.[28] *See* Mar. 7 (AM) at 140:23-41:23 (Knight).

New capacity resources bidding into the BRA are subject to the MOPR, found in the PJM Tariff. The MOPR has been in place since establishment of the RPM in 2006, but its form has varied. *See id.*

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[28] Professor Willig explained that a capacity bid of zero by an existing generation facility may well reflect its costs on the capacity side for keeping the generation facility going during the future delivery year because once the plant is built and does not need new investment the forward-looking incremental cost of the capital is not high, it could be zero." Tr. Mar. 8 (AM) at 21:9-18 (Willig).

at 91:20-22. In essence, the MOPR subjects new generation resources to a minimum bid amount to ensure that . . . new plant generating resources . . . bid[] their competitive cost-based fixed nominal net cost of new entry if it was to rely purely on PJM market revenues alone," and thereby precludes new generators from acting as price takers. *Id.* at 92:1-4.

(2) Determining the Market Clearing Price and Clearing Capacity in the BRA

After all capacity offers are submitted into the BRA, PJM must determine: (1) which offers will successfully sell into, or clear, the BRA and (2) the single price that PJM will pay for the cleared capacity (the "market clearing price"). Broadly speaking, PJM makes these determinations by taking the capacity bids, in ascending price order, until a pre-determined capacity demand amount is fulfilled. The price of the bid that fulfills the demand amount sets the market clearing price for everyone. Every bid at, or below, the market clearing price clears the BRA, and every bid above the market clearing price does not.[29]

Explanation of the RPM framework and establishment of a market clearing price in any given BRA can be illustrated by the simplified hypothetical provided by Plaintiffs' witnesses:

1. In a BRA, PJM receives a number of capacity bids at a variety of prices and amounts. The bids are submitted in a sealed fashion so that initially, only PJM

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[29] If there happens to be too much capacity bid at the market clearing price, a bid at that price may not entirely, or even at all, clear the BRA.

knows what each capacity resource bid into the BRA.

2. Every capacity bid submitted is stacked in ascending order of price, lowest priced bid at the bottom and highest priced bid at the top. Once the bids are stacked in price order, one can tell the total MW-Days available at each bid price by adding up the MW-day amount of each bid preceding any particular price:

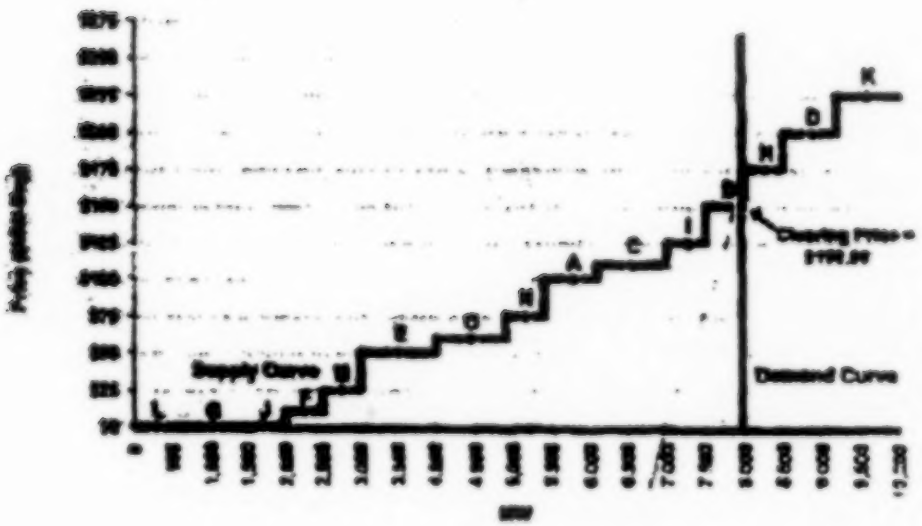
Generator	MW-Day Bid	Price Bid	Total MW-Days Available at Each Price
L	500	$0	500
G	700	$0	1,200
J	800	$0	2,000
F	500	$10	2,500
M	500	$25	3,000
Etc.			

3. A graph can be created in which, in ascending order, the x-axis is MW and the y-axis is Price ($MW-Day). PJM uses the bids stacked in price order to create a "supply curve" and plots that supply curve on the graph. With just the supply curve plotted, one can see that at the price of $25/MW-day on the y-axis, the BRA generated bids totaling 3,000 MW, represented on the x-axis. Stated differently, there are 3,000 MW of capacity bid into the BRA willing to accept $25/MW-day or less for the capacity.

4. Next, PJM configures a Variable Resource Requirement curve ("VRR Curve" or

"demand curve"), representing the total amount of capacity in MW that PJM has determined must be procured through the BRA to adequately supply forecasted load within the PJM region for the one-year period three years following the BRA.

5. The demand curve, generally a vertical line, is plotted on the graph at the appropriate amount of MW on the x-axis. The demand curve then intersects with the supply curve of stacked bids when the aggregate amount of capacity offered is equal to the demand in MW established by PJM. The point at which the supply curve intersects with the demand curve is the market clearing price and the market clearing amount of capacity. This is illustrated by the demonstrative submitted by Plaintiffs:



6. As illustrated above, if the demand is determined to be 8,000 MW, the market clearing price would be $150/MW-day. This means that all capacity offered at or below that price clears the BRA. Every bidder whose capacity cleared the BRA will be paid the clearing price of $150/MW-day. As a result, even the generators that bid $0 for their capacity will receive $150/MW-day.

Tr. Mar. 8 (AM) at 28:24-38:24 (Willig). If a generation resource successfully clears capacity in the BRA, PJM rules require the generator to offer the electric energy generated in the PJM Energy Market.

Since the market clearing price in any BRA is entirely dependent on the bid prices received by PJM from capacity resources (again, which for existing resources can be $0), the price is volatile and difficult—if not impossible—to predict with a reasonable degree of reliability. *See* Tr. Mar. 8 (AM) at 76:19-22 (Willig); Tr. Mar. 11 (AM) at 32:8-12 (Roach); Tr. Mar. 11 (PM) at 101:20-102:1 (Kahal). The following reflects six years of BRA clearing prices:

	Market Clearing Price		
Delivery Year	PJM (charted as "RTO")	SWMAAC Southwest Mid-Atlantic Area Council	MAAC Mid-Atlantic Area Council
2007/2008	$40.80	$188.54	$40.80
2008/2009	$111.92	$210.11	$111.92
2009/2010	$102.04	$237.33	$191.32
2010/2011	$174.29	$174.29	$174.29
2011/2012	$110.00	$110.00	$110.00
2012/2013	$16.46	$133.37	$133.37

See D.34 (2015/2016 RPM BRA Results).

(3) Locational Deliverability Areas ("LDAs") and Price Separation in the BRA

In theory, the BRA could establish one uniform market clearing price based on one model supply and demand curve for the entire PJM region. However, in practice the process is significantly more complicated. When procuring capacity through the BRA, PJM recognizes that not all locations are equally situated. Transmission constraints exist that make importing energy and capacity into certain areas within the PJM region more difficult than importing into other areas. A "transmission constraint" is a limitation on the ability of the transmission system or infrastructure effectively and reliably to transport electric energy from one point to another point within the PJM region. *See* Tr. Mar. 8 (AM) at 94:6-95:8 (Willig). PJM employs several indicators and standards to alert whether and where transmission constraints exist and the consequences, affects, and severity of any such constraints.

In the context of the PJM Capacity Market, to take locational transmission constraints into account, PJM models certain areas as Locational Deliverability Areas ("LDAs") for purposes of the BRA.[30] An area or zone is modeled as an LDA if the amount of transmission import capability into [that] area from the rest of the RTO (the Capacity Emergency Transport Limit ("CETL")) falls below a target ratio with the level of capacity needed to import power to meet reliability requirements under the Capacity

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[30] There can be transmission constraints between any two points within the PJM region for a variety of reasons not just with respect to energy being dispatched into an LDA.

Emergency Transfer Objective ("CETO").[31] P.42 (2011 Boston Pacific Evaluation of Draft RFP) at 16. "The lower the ratio, the 'tighter' supply line into the area. If the CETL/CETO ratio is less than 1.15, then the area must be modeled as a separate zone in RPM." *Id.* Being modeled as an LDA neither precludes generators outside the LDA from supplying electric energy into the LDA, nor necessarily affects the ability of generators outside the LDA to enter into bilateral agreements for energy and/or capacity with LSEs within an LDA. *See* Tr. Mar. 4 (PM) at 115:16-117:6 (Cudwadie).

Once an area or zone is modeled as an LDA, it functions as a separate capacity market with a separate supply and demand curve and a separate market clearing price from the balance of the PJM footprint. That is, there are "separate supply stacks and separate reliability needs . . . considered by the PJM" in the BRA process for an LDA. *See* Tr. Mar. 8 (AM) at 93:15-19 (Willig). Since LDAs function as a separate capacity market for purposes of the BRA, the market clearing price for an LDA *may* be different from the price for the rest of the RTO. When the market clearing price for an LDA is different from the balance of the PJM footprint the phenomenon is referred to as "price separation." *See* Tr. Mar. 4 (PM) at 113:23-114:1 (Cudwadie).

Price separation occurs because each LDA has a separate target capacity reserve level and a maximum limit on the amount of capacity that it can import from resources located outside of the LDA. *See id.* at

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[31] The CETO is an import capability required by an area to comply with a Transmission Risk of Loss of Load Event of 1 in 25 years.

114:1-115:15, 119:2-122:23. As a result of the import limitation, a lower-priced capacity resource located outside the LDA may be "skipped" or excluded from the stack of bids used by PJM to create the supply curve. This occurs because the LDA has reached its import limit so that even though the outside resource is the next bid in price order PJM will not select it to meet the capacity needs within the LDA. *See* Tr. Mar. 8 (AM) at 94:2-22 (Willig). Where lower-cost capacity resources outside of the LDA are excluded due to the import limitation, PJM must then select more expensive capacity resources located within the LDA to fulfill the LDA's capacity target level. *See* Tr. Mar. 4 (PM) at 113:23-115:15, 119:8¬122:15 (Cudwadie). When an LDA reaches its import limitation before the LDA's capacity needs are met and PJM is forced to select more expensive capacity bids from within the LDA, the LDA's market clearing price will separate from the rest of PJM because the last capacity bid selected—a more expensive resource within the LDA—sets the LDA price at a level higher than the RTO clearing price. *See id.*

Within the PJM region, the Mid-Atlantic Area Council ("MAAC") is modeled as an LDA. The Southwest Mid-Atlantic Area Council ("SWMAAC") is a sub-LDA within MAAC. *See* Tr. Mar. 4 (PM) at 27:6-10 (Carretta). SWMAAC includes part of Maryland and the District of Columbia; about 98% of SWMAAC is within Maryland. Tr. Mar. 6 (AM) at 37:15-18 (Massey). SWMAAC includes the transmission systems of BGE and Pepco. The portions of Maryland not in SWMAAC are in the Eastern Mid-Atlantic Area Council ("EMAAC"), a sub-LDA that includes parts of Delaware, Pennsylvania, and New Jersey. Tr. Mar. 5, 2013 (AM) at 106:15-18 (Nazarian). In the BRA conducted for the 2015/2016 delivery year, the market

clearing price in all of MAAC (including EMAAC and SWMAAC) was $167.46/MW-day, and the market clearing price in the rest of PJM was $136.00/MW-day. D.34 (2015/2016 RPM BRA Results). For the 2010/2011, 2011/2012, 2012/2013, and 2015/2016 delivery years, the market clearing price for SWMAAC did not separate from the rest of MAAC, even in years when MAAC separated from the balance of the PJM footprint. Id.

(iv) Price Signals

FERC has described the PJM Capacity Market as "provid[ing] long-term price signals to attract needed investment in the PJM region through a competitive auction process three years in advance." *PJM Interconnection, LLC*, 132 FERC ¶ 61,173, 61,870 (2010). PJM identifies the RPM system as a means of providing "incentives that are designed to stimulate investment both in maintaining existing generation and in encouraging the development of new sources of capacity—not just generating plants, but demand response and energy efficiency programs as well." P.516 (PJM—At a Glance) at 8. Plaintiffs submitted expert testimony to explain in an economic sense how the capacity prices set in the PJM Capacity Market through the RPM send price signals to market participants capable of inducing investment in generation development. Plaintiff's expert, Professor Willig, opined that higher capacity prices in an LDA encourage projects to be developed in that area because the RPM[32] "reflect[s] the locational impact on

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[32] According to Professor Willig, the same principles apply to the LMP in the PJM Energy Market because the LMP increases to the extent there is "congestion" or some other constraint as to the transmission system in dispatching electric energy to a particular location.

need and on cost" of electric energy. Tr. Mar. 8 (AM) at 95:9-24, 99:5-20 (Willig). According to Professor Willig, because the RPM is configured to create a positive correlation between transmission constraint and price, higher prices indicate greater difficulties in importing energy into an LDA, which signals to the market a need for capacity development and/or signals to PJM a need for transmission planning. *Id.* at 98:6-99:20. This is because constraint on the transmission system can be eased by additional capacity resources in the right location and/or new or expanded transmission lines to that location. *Id.* As Professor Willig concluded, a decrease in constraint, either by additional capacity or by a transmission-related solution, "will tend to bring pricing closer, because when prices are closer, it's because there's less constraints between their areas." *Id.* at 99:5-9.

The PSC has stated that the RPM "ha[s] failed to attract new generation in [Maryland] to mitigate these longer-term reliability concerns," and that "RPM'S signal remains unable to anchor the financing new generation development requires." P.2 (2011 RFP) at 3.

D. Maryland's Regulation of Electric Energy

Maryland has, as have various other states, abandoned the vertical integration model of electric energy regulation.

1. Pre-Restructuring Vertical Integration

Before the restructuring of 1999, Maryland's electric utilities (such as BGE and Pepco) were vertically integrated and predominately regulated by the Maryland PSC, except insofar as the utilities engaged in wholesale transactions, which were regulated by FERC. Tr. Mar. 5 (AM) at 40:23-41:18 (Nazarian).

Even then, however, Maryland's utilities imported approximately 30% of the electric energy resold to end-use customers from generation resources outside the state in wholesale transactions. *Id.* at 50:6-51:24.

Under the vertically integrated structure, the PSC generally retained authority to "regulate[] the distribution, transmission and generation rates" that Maryland utilities charged to rate payers. P.606 (PSC Order No. 81423) at 33. The rates charged by Maryland utilities to end-use customers were determined by the PSC through cost-of-service principles. That is, the PSC set rates that "w[ould] result in an operating income to the [utility] that yields, after reasonable deduction for . . . expenses and reserves, a reasonable return on the fair value of the [utility]'s property used and useful in providing service to the public." *Id.* at 33-34; P.391 (2007 PSC Interim Report) at 10. Because the Maryland utilities primarily sold electric energy generated by their own power plants to users in retail transactions, the PSC effectively determined—through its rate making authority—whether new or additional generation resources would be built in Maryland. Generation development by a Maryland utility would be financed through rate increases, which required approval by the PSC. *See* P.162 (2009 Nazarian Presentation) at slide 10. Additionally, in pre-restructured Maryland, ratepayers had no choice as to their electric utility supplier; they purchased electricity from whichever utility's service territory in which they were located. *See* Tr. Mar. 5 (AM) at 43:12-23, 44:21-24 (Nazarian).

2. 1999 Maryland Restructures

In 1999, the Maryland General Assembly passed the Electric Customer Choice and Competition Act (the "1999 Act"), which restructured, or deregulated,

Maryland's electric energy market. *See* Md. Code Ann., Pub. Util. § 7-504, *et seq*. The premise of the 1999 Act was that electric consumers would benefit more from a competitive market for their electricity rather than being captive to a single utility that had a monopoly on their electricity service." P.606 (PSC Order No. 81423) at 36. The 1999 Act put this premise into effect by removing generating assets from the control and ownership of the Maryland utilities and requiring the utilities to provide Standard Offer Service, discussed in more detail *infra*, to their customers.

Post-restructuring, the PSC remains an agency empowered by the State of Maryland to assure "safe, adequate, reasonable, and proper [electric] service." Md. Code Ann., Pub. Util. § 5-101(a). In addition to regulating the procurement of electric energy by the Maryland Electric Distribution Companies (the "EDCs" or "Maryland EDCs") for Maryland residents, the PSC administers a streamlined "process by which transmission and generating facilities are sited and . . . approve[d]" for construction in Maryland. P.606 (PSC Order No. 81423) at 42. However, the PSC does not evaluate the need for new generation stations in Maryland. Rather, that need is determined by the marketplace. Tr. Mar. 5 (AM) at 58:18-59:5 (Nazarian) (noting the "residual authority [of the PSC] to order new generation in anticipation of a long-term demand in the state").

a. Separation of Generation Assets

The 1999 Act separated the Maryland "utilities' [Maryland-located] generating assets from their distribution and transmission functions" by transferring ownership of those generation assets to other companies that owned and operated the power

plants. P.391 (2007 PSC Interim Report) at 10; *see also* Md. Code Ann., Pub. Util. § 7-504(3); Tr. Mar. 5 (AM) at 42:13-18 (Nazarian). This separation effectively forced Maryland utilities, now referred to as EDCs, to purchase electric energy at wholesale, thereby engaging in federally regulated energy transactions. Since the EDCs no longer owned generation assets or power plants,[33] "electricity previously subject to traditional rate-of-return regulation (in which the PSC set the utility's profit through a state regulatory proceeding) would now be purchased by local [EDCs] in the federally regulated wholesale electricity market" for purposes of re-selling that electricity to end-use customers. P.391 (2007 PSC Interim Report) at 10. Consequently, Maryland EDCs now rely on the wholesale energy market regulated by FERC to purchase the electric energy that they ultimately sell to end-use customers. *See* P.606 (PSC Order No. 81423) at 37. By virtue of having to purchase energy at wholesale, the Maryland EDCs (and correspondingly Maryland ratepayers) are financially affected by wholesale prices set by the PJM Markets.

b. Standard Offer Service

Maryland's restructuring not only required local utilities to divest themselves of ownership of power-generating facilities, but also allowed Maryland electricity consumers to choose their electric energy supplier. Electricity customers in Maryland have a choice to buy electric service from the default local utility or from an alternative supplier. Tr. Mar. 5 (AM) at 45:3-47:19 (Nazarian). The sale of electricity

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[33] Post-restructuring, Maryland's EDCs still own their transmission and distribution systems. *See* Tr. Mar. 5 (AM) at 42:13-43:15 (Nazarian).

supplied by the default local utility is called Standard Offer Service ("SOS"). The PSC regulates the SOS procurement process, which is conducted by the Maryland EDCs, and the rate the EDCs may charge customers for SOS. *See id.* at 44:2-45:23. If a Maryland customer chooses an alternative supplier, that transaction is a matter of contract and is not regulated by the PSC. *See id.* at 46:16-24, 48:10-18. Since Maryland's energy market is deregulated, the EDCs purchase the electric energy for SOS from the wholesale market. This procurement of electric energy takes place through contractual agreements as well as through the use of "PJM spot energy markets."[34] OPC's Post Trial Br. [Document 140] at 15-16. According to the Maryland Office of People's Counsel, only 15% of all wholesale electricity sales in the PJM region occur through "PJM spot energy markets." *Id.* at 15.

E. The Path to the PSC Order

In mid-2000, the Maryland General Assembly and the PSC began to voice concerns over the operations of Maryland's electricity markets, the post-restructuring consumer electricity rates, and the existence of adequate generation resources to serve the energy needs of Maryland ratepayers. For instance, in the summer of 2006, the General Assembly convened a special session to pass legislation that would mitigate a proposed 72% rate increase on residential ratepayers [in the] BGE" territory, the largest utility territory in Maryland. P.391 (2007 PSC Interim Report) at 5.

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[34] "[I]f [the EDCs'] customers use more energy in a particular hour than they have bought ahead of time for that hour, then they buy the residual through the PJM spot energy market." OPC's Post Trial Br. [Document 140] at 15.

These concerns, which took the form of several legislative and regulatory actions, eventually culminated in the issuance of the Generation Order at issue.

1. Maryland General Assembly Orders the PSC to Study Re-Regulatory Options for Maryland

In May 2007, the Maryland General Assembly signed into law Senate Bill 400, calling for the PSC to study re-regulatory options and the availability of adequate generation and transmission assets in the state and to also provide the General Assembly with interim and final reports[35] containing the results of the PSC's evaluations. *See* P.391 (2007 PSC Interim Report) at 1; *see also* EmPOWER Maryland Energy Efficiency Act of 2008, Md. Code Ann., Pub. Util. § 7-211.

In December 2007, the PSC filed its interim report with the General Assembly that "offer[ed its] recommendations and analysis regarding options for 're-regulating' Maryland's electricity markets and for obtaining new generation and transmission resources" in Maryland. P.391 (2007 PSC Interim Report) at 1. In the interim report, the PSC explained that "*Maryland faces a critical shortage of electricity capacity* . . . because Maryland sits in a highly congested portion of the regional electric transmission system (which makes it difficult to bring more power in) and because we use more electricity than is generated here." *Id.* To respond to this problem, the PSC advised that Maryland could "add more capacity, either through

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[35] The reports provided to the Maryland General Assembly consisted of reports authored by the PSC and by two groups of consultants, the law firm Kaye Scholer LLP and the economic consulting firm Levitan & Associates, Inc.

new generation or transmission, or . . . reduce the amount of electricity [it] use[s]." *Id.*

Describing the wholesale and retail markets as "structured ostensibly to create price incentives for new generation or transmission," the PSC noted that the wholesale markets had not responded to Maryland's needs and opined that those markets were unlikely to respond in the immediate future to the state's "looming capacity shortage." *Id.* According to the PSC, "capacity shortages and transmission constraints" in Maryland caused consumers to "pay much higher than average prices for wholesale (and thus retail) electricity." *Id.* The PSC reasoned that this situation provided no incentive for existing generators to build more capacity and increase the supply, since such actions would decrease the price received by the generators for energy and capacity on the wholesale market. *See id.*

Ultimately, after reviewing reports presented by two groups of consultants, the PSC concluded that "[t]he analyses by [the consultants] combine to create a compelling case for directing utilities in the state to enter into long-term contracts to induce the supply of new electricity in Maryland. This is a 're-regulation' option that we believe should be pursued and that we intend to pursue." *Id.* at 41. The PSC believed this option would maintain the reliability of the transmission grid and obtain the best possible prices for Maryland ratepayers. Tr. Mar. 5 (AM) at 64:5-11 (Nazarian).

2. PSC Initiates the "Gap RFP Proceeding"

In the summer of 2007, PJM began warning the PSC about a potential capacity shortfall in Maryland for the following year. In November 2008, the PSC issued

an order in Case No. 9149, referred to as the "Gap RFP Proceeding," to address "a ['potential'] gap between the anticipated need [for electricity] in the summers going forward based on load forecasts and the known resources available to serve that need" in response to PJM's representation of a "potential delay in a transmission line project" known as the TrAIL Line. Tr. Mar. 5 (AM) at 74:10-76:19 (Nazarian). Seeking new demand response resources that would bid as capacity resources into the BRA, the PSC ordered the four Maryland EDCs to issue Requests for Proposals ("Gap RFPs"). P.345 (PSC Order in Case No. 9149) at 7. In exchange for the demand response resources bidding into the BRA, the PSC offered the EDCs contracts for differences that apparently guaranteed the suppliers a fixed revenue stream for the demand response, irrespective of the market clearing price in the BRA. The Gap RFPs yielded 600 MW of demand response.[36]

3. PSC Provides Final Report to General Assembly

On December 10, 2008, the PSC provided its final report to the Maryland General Assembly. *See generally* P.582 (2008 PSC Final Report). In the report, the PSC stated that in addition to reliability measures already underway, the PSC would "undertake a new investigation in 2009 to determine whether[,] and on what terms[,] to direct or solicit the construction of one or more new power plants in Maryland." *Id.* at 2. Former PSC Chairman Nazarian testified that although the PSC had intended to open

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[36] Demand response capacity in the amount of 600 MW means a commitment to decrease the demand for electric energy up to 600 MW if and when called upon by PJM to do so.

a proceeding for the particular purpose of addressing that issue, it never opened such a case. Trial Tr. Mar. 5, 2013 (AM) at 78:22-81:-23 (Nazarian). Instead, the PSC commenced a proceeding related to inducing new generation in Maryland—Case No. 9214. It is this proceeding that led to the PSC's issuing the Generation Order.

4. CPV Requests a Long-Term Contract from the PSC in an Unrelated Matter

In PSC Case No. 9117, a case unrelated to the Generation Order, CPV filed a motion to intervene and "strongly urge[d] the [PSC] to encourage policies that promote and direct long-term (10 to 15 years) PPAs [Purchase Power Agreements] from in-state generation to serve Maryland's load." P.31 (CPV Motion to Intervene) at 3. In July 2009, CPV made a specific request that the PSC "order one or more [Maryland EDCs] to enter into 20-year long-term contract(s)" providing a fixed revenue stream to CPV for purposes of financing CPV's development of new generation in Charles County, Maryland.[37] P.14 (2009 CPV Motion) at 1; Tr. Mar. 5, 2013 (AM) at 86:21-87:16 (Nazarian).

In its filings in Case No. 9117, CPV asserted its belief in the necessity of having state-sponsored long-term financing to move forward with its Charles County project because "traditional commercial banks no longer are willing to finance the types of risks they might once have undertaken; nor will they be willing to rely on third party consultant reports estimating a

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[37] Former PSC Chairman Nazarian reflected that in 2008-2009, CPV advocated heavily and strongly for the PSC to order the long-term contract, but the PSC never gave CPV the contract. Tr. Mar. 5 (AM) at 85:13-86:3 (Nazarian).

project's potential revenue stream in a particular wholesale market." P.14 (2009 CPV Motion) at 22. CPV explained that "RPM'S conditional three-year commitment period is simply insufficient to allow new baseload [sic] generation to be financed [because] the RPM is too short-term, too volatile, and too fraught with continued regulatory uncertainty to provide lenders with anything close to the certainty of a fixed revenue stream required for financing." *Id.* at 24. CPV went on to note that "given RPM'S purpose to provide an accurate price signal to new generation, the FERC rejected" proposed changes to RPM that would extend the commitment period. *See id.* at 24-25.

Instead of granting CPV's request for a state-sponsored financing contract specifically for CPV's Charles County project, in September 2009 the PSC opened a separate proceeding, Case No. 9214, which implemented the competitive bid process that eventually resulted in the Generation Order, and eventually awarded the contract for differences to CPV for its Charles County project. Tr. Mar. 5 (AM) at 85:13-86:20 (Nazarian).

5. PSC Opens Case No. 9214 for "New Maryland-Located Electric Generating Facilities"

On September 29, 2009, the PSC initiated Case No. 9214 and directed "[t]hat any proposals for new Maryland-located electric generating facilities . . . be filed by December 11, 2009." P.35 (PSC Order No.82936) at 3-4.

a. The Draft RFP and Engagement of Boston Pacific

On December 29, 2010, the PSC issued for comment a draft Request for Proposals for Generation Capacity Resources Under Long-Term Contract (the "Draft

RFP"). *See generally* P.13 (2010 Draft RFP). The Draft RFP solicited up to 1,800 MW of capacity, energy, and ancillary services from generation resources. The PSC invited all interested parties to review the Draft RFP and provide comments.

The Draft RFP differed in several respects from the RFP ultimately issued by the PSC. For example, the Draft RFP solicited proposals from all types of generation resources and permitted bids from existing facilities that would uprate, or expand, their existing generation capacity. With respect to locational requirements, the Draft RFP required "[t]he proposed Generation Capacity Resource [to] be interconnected to the System such that the [resource's] output may be infed to a node east of the Western Interface and deliverable to Maryland east of the Western Interface avoiding likely transmission congestion." *Id.* at 15. Using this locational definition, it was possible for a generation facility in Pennsylvania to submit a proposal to the PSC in response to the Draft RFP. *See* Tr. Mar. 5 (AM) at 99:6-100:6 (Nazarian).

In the summer of 2011, the PSC engaged Boston Pacific Company, Inc. ("Boston Pacific") to perform consultation work in connection with the Draft RFP. Tr. Mar. 5 (AM) at 100:20-102:1 (Nazarian). On August 12, 2011,[38] Boston Pacific provided the PSC with its (1) "review [of] the factual basis for the reliability concern that motivated the [PSC] to issue the Draft RFP," (2) view of possible paths forward for the PSC, and (3) "suggested edits to the Draft RFP." P.42 (Boston Pacific Evaluation of Draft RFP) at 1.

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[38] Boston Pacific filed its report in Case No. 9214 on January 23, 2012.

Regarding the reliability concern in Maryland, Boston Pacific observed that conditions had improved since 2008 when the PSC provided its final report to the Maryland General Assembly illustrating scenarios in which there could be a generation shortfall in Maryland. For example, many of the scenarios posited to the General Assembly in 2008 related to a failure on the part of PJM to secure the construction of the Trans-Allegheny Interstate Line ("TrAIL Line"). *Id.* at 1-2, 15. But, as Boston Pacific pointed out, PJM had come through and the TrAIL Line had gone into service in May 2011 "providing more transmission support for the [Maryland] region." *Id.*

Boston Pacific also explained that load growth in Maryland had declined, reducing pressure on the transmission system, and that demand response resources had materially increased, due in part to the Gap RFPs. *Id.* However, Boston Pacific identified "several key risk factors that could rapidly change Maryland's future [energy] supply needs." *Id.* at 2. Specifically, Boston Pacific noted:

> (1) "[L]oad growth could be higher than expected;"
>
> (2) "[R]etirements of existing generation facilities could be greater than expected [where] coal-fired generation makes up about 60% of all electricity produced in [Maryland, and] sources anticipate new EPA regulations will force shutdowns and increase costs as coal-fired generators modify their plants," which would leave Maryland more reliant on importing power; and

(3) Certain PJM transmission projects, such as the MAPP line, may not be completed on time, which is of concern since "Maryland imports roughly 30% of its power" and relies on transmission to bring power into the state.

Id. at 2, 17-27.

Boston Pacific identified two alternatives for the PSC to respond to reliability concerns: (1) take more time to evaluate the risks identified by Boston Pacific or (2) issue a request for proposals "targeted to address and mitigate the key risks" identified by the company. *Id.* at 3, 27. Boston Pacific advised the second option if the PSC "believes . . . that the current risks to reliability are great enough to justify immediate action, and that RPM will not bring new generation to the State." *Id.* at 3. If the PSC decided on the second option to issue a request for proposals, Boston Pacific suggested several modifications to the Draft RFP "[t]o effectively mitigate the [reliability] risks" faced by Maryland. *See id.* at 3-5. Boston Pacific advised:

> [T]he RFP should specifically solicit only new, in-State, natural gas-fired combined-cycle generation located in SWMAAC or Eastern MAAC (EMAAC) . . . because [those] zones, due to their constrained nature, have seen the highest RPM prices, the least development of generation and are most at risk for reliability problems caused by load swings, generator retirements, and transmission issues.

Id. at 4; *see id.* at 30-31.

b. The PSC Issues the RFP Seeking Proposals to Construct and Operate a New Generation Resource in SWMAAC in Exchange for the Contract for Differences

On December 8, 2011, the PSC issued the Amended Request for Proposals for New Generation to be Issued by Maryland Electric Distribution Companies (the "RFP"), which ordered each Maryland EDC to issue an attached request for proposals.[39] *See generally* P.2 (2011 RFP).

According to the PSC, the RFP's purpose was "to ensure the continued, long-term reliability of the electricity supply to Maryland customers by mitigating key risks faced by the State." *Id.* at 1. Such risks, as listed in the RFP, included the risks identified by Boston Pacific, as well as "*the risk that RPM will not attract enough new capacity to address these risks effectively, whatever the level of need turns out to be.*" *See id.* at 2-3. According to the PSC, "RPM has failed to attract new generation in the State to mitigate these longer-term reliability concerns, and RPM'S signal remains unable to anchor the financing new generation development requires." *Id.* at 3. Consequently, the PSC concluded that, "[a]lthough [it] appreciates PJM's role in planning regional transmission solutions, . . . [b]ecause market forces have not produced new generation in our region," the PSC may need to order the construction of new

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[39] The PSC issued the first RFP on September 29, 2011, but after holding a pre-bid conference concerning the RFP, it issued the amended RFP on December 8, 2011. Among other things, the amended RFP extended the proposal due date to January 20, 2012. *See* P.2 (2011 RFP) at 12.

generation to "satisfy the long-term anticipated demand in Maryland" for electric supply. *Id.* at 3-4.

The PSC set a deadline of January 20, 2012 for proposals from interested parties for the construction and operation of new generation resource(s) to be submitted pursuant to the requirements detailed in the RFP. In exchange for building and operating the generation resource, the PSC offered the selected supplier a long-term contract for differences with three Maryland EDCs, which would provide the supplier with a guaranteed revenue stream based upon the supplier's wholesale energy and capacity sales into the PJM Markets. The PSC stated that it would select "the bid(s) that produces the lowest-cost solution for ratepayers when accounting for risk." *Id.* at 16. The PSC explicitly reserved the right to reject all proposals submitted in response to the RFP.

(i) Requested Generation Resource(s) Requirements

In the RFP, the PSC sought proposals to build and operate a particular type of generation resource in a particular location. Specifically, the PSC only solicited proposals for:

- "[N]ew, natural gas-fired" generation capacity resources;
- Physically located inside the SWMAAC zone of the PJM region;
- Capable of producing energy and capacity products "not to exceed, a total installed capacity of 1,500 MW;"
- "[F]or an initial term of up to twenty years beginning no earlier than June 1, 2015 and no later than June 1, 2017."

Id. at 4-5. Hence, an existing generation resource or a resource physically located outside of SWMAAC was ineligible to submit a proposal to the PSC and to compete for the long-term financial benefits to be awarded to any selected submission.

Pursuant to the structure employed by the RFP,[40] the selected supplier would construct, operate, and own the new generation resource. As to the physical delivery of energy and capacity, the supplier would be obligated to offer the generator's output to PJM in the PJM Markets. *See id.* at 5. The PSC described the selected supplier's relationship with the Maryland EDCs as a "financial arrangement . . . in which the physical delivery to the EDC of Capacity, Energy and Ancillary Services is not required. . . . Hence, the delivery of Capacity and Energy will be settled financially rather than physically, thereby providing compensation to Supplier for Capacity and Energy." *Id.*

(ii) The Contract for Differences

As outlined in the RFP, the compensation structure for any supplier chosen by the PSC to construct and operate a new generation resource in SWMAAC would be governed by a long-term contract for differences ("CfD"). The RFP provided that, after selecting a supplier, the PSC would direct or order one or more of the Maryland EDCs to enter into the CfD with the

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[40] The PSC attached to the RFP a draft contract for differences "to be executed as a result of th[e] RFP." *Id.* at 6. The PSC explained that the contract for differences "is meant to memorialize the terms and conditions described in this RFP; to the extent there is any conflict, this RFP controls and the final Agreement will be revised to comply with it. The Agreement contains the parties' rights and obligations for providing and receiving Capacity and Energy." *Id.*

supplier. The CfD contained compensation provisions that enabled the selected supplier to receive its proposed "contract price" for each unit of energy and capacity sold to PJM in the PJM Markets up to a ceiling amount. *See generally id.*; *id.*, Attachment 1 (CfD Settlement Example); *id.*, Attachment 8 (Sample CfD).

The terms of the RFP required each submitted proposal to contain "the total pricing provisions for the Capacity and Energy produced by the Generation Capacity Resource over the contract term." *See* P.2 (2011 RFP) at 10-11. The RFP and its attachments contained detailed explanations of the parameters for submission of the contract price.

At trial, CPV explained its "method" for reaching the proposed contract price. CPV assessed the costs of all of its obligations surrounding its proposed project, including: construction of its facility; fixed operating costs going forward, such as labor, property taxes, and maintenance; raising capital to finance the construction; and a reasonable rate of return to CPV. CPV then applied those assessments to a financial model to determine the annual revenue requirements necessary to construct and operate its proposed generation resource. Tr. Mar. 7 (AM) at 122:15-123:19 (Knight). That annual revenue requirement served as the basis for CPV's requested contract price presented in $/MW-day of unforced capacity and $/MWh.

As discussed in detail *infra*, under the CfD the actual revenue received by the supplier for its sale of energy and capacity in the PJM Markets is compared to what the supplier would have received for those sales had the contract prices been controlling, and any difference is settled between the supplier and the EDC(s). If the contract prices are higher than the

market prices, the EDC(s) pays the difference to the supplier. If the market prices are higher than the contract prices, the supplier pays the difference to the EDC(s). In the event the EDC(s) have to make payments to the supplier, the EDCs would able to recoup their losses through increases in the rates paid by Maryland SOS customers. Correspondingly, the EDC(s) would be required to pass on any gains to the SOS ratepayers.

c. The Generation Order and Selection of CPV's Charles County Proposal

In response to the RFP, the PSC received seven bids, including a proposal from CPV for the construction and operation of a power plant in Charles County, Maryland. On April 12, 2012, after evaluation of the bids, the PSC issued the Generation Order directing BGE, Pepco and Delmarva (the "Maryland EDCs") "to enter into a Contract for Differences with CPV . . . under which CPV will construct a 661 megawatt (MW) natural gas-fired combined-cycle generation plant in Waldorf in Charles County, Maryland, with a commercial operation date of June 1, 2015. P.44 (Generation Order) at 7.

The PSC determined that CPV's bid provided "the best price for [Maryland] SOS ratepayers, with the average impact to residential SOS ratepayers projected to be a *credit* of $0.49/month over the entire life of the contract." *Id.* at 26. The PSC also ordered that the Maryland EDCs required to enter into the CfD with CPV should recover their costs from all Maryland SOS ratepayers, not just those ratepayers in the SWMAAC zone. *Id.* at 26-27.

In the Generation Order, the PSC provided a summary of the comments it received from various

interested parties with respect to moving forward with the RFP. Specifically, the Maryland EDCs opposed proceeding with the RFP on the grounds that customers would be 'burdened' with additional costs for unneeded and uneconomic generation." *See id.* at 10-12. With respect to the Plaintiffs, PPL opposed the RFP on the grounds that "it is not necessary because the competitive market is working to create reserve margins above 20% through 2015, and trends indicate demand is declining." *Id.* at 13-14. Similarly, PSEG "assert[ed] that proceeding with the RFP will interfere with the proper functioning of the wholesale competitive market." *Id.* at 14. The PSC rejected these concerns along with the contention that demand needs could be satisfied by the RPM and the BRA, stating:

> [O]f critical importance, we cannot rely on PJM's Reliability Pricing Model to deliver new generation to Maryland. . . . Since its inception in 2007, RPM has brought no new generation to Maryland, in spite of the fact that clearing prices for capacity in SWMAAC have averaged almost double those of the non-constrained portions of PJM. . . . Despite these exorbitant capacity charges, which have increased energy costs to Maryland ratepayers by hundreds of millions of dollars, no new base load generation was bid into the BRA during the 2012-2014 delivery period. Zero. The simple fact is that the one year signal, three years into the future has not provided sufficient certainty for prospective generation suppliers to secure financing in the current economic climate. And we do not find it reasonable to require us . . . . to entrust the reliability of our State's electricity supply entirely to the operation of a capacity market

> that, by design, seeks to incept long-term assets solely through short-term price signals.

Id. at 22-23.

F. Commercial Power Ventures Maryland

Commercial Power Ventures Maryland ("CPV") and its affiliates develop natural gas-fired and renewable energy generation facilities and manage generation assets on behalf of other owners, usually financial institutions that have taken control of the asset as collateral. Tr. Mar. 7 (AM) at 87:7-25. (Knight). CPV is located in Charles County, Maryland, which is part of the SWMAAC LDA.

In 2006, CPV began planning the project to build its Charles County Facility (the "Facility"). Tr. Mar. 7 (PM) at 87:3-10 (Egan). As discussed *supra*, CPV was of the opinion that it needed a long-term price contract, or its equivalent, to finance the construction and development of the Facility. *Id.* at 89:6-18. In about 2008, after exploring options in the open market to no avail, CPV began pursuing the procurement of a long-term contract from the State of Maryland, and in 2009 it formally requested such a contract from the PSC. Id. at 88:9-15. As discussed herein, on April 12, 2012, the PSC issued the Generation Order selecting CPV's generation proposal and awarding CPV the CfD. As of the time of bench trial, CPV has stated that it would not move forward with construction of the Facility without the CfD. *Id.* at 89:15-18, 93:21-94:1.

In the spring of 2012, CPV bid 661 MW-days of capacity from its yet-to-be-built Facility into the BRA. Tr. Mar. 7 (AM) at 104:19-107:22 (Knight). Because it involved a new generation resource, CPV's bid was subject to the MOPR, which FERC had recently

modified in 2011. The MOPR, as it existed in 2012, placed a floor on CPV's bid into the BRA that precluded CPV from bidding zero and acting as a price taker. Pursuant to the MOPR, CPV could not bid less than 90% of Net CONE (Cost of New Entry)[41] or its unit specific cost once it received a unit-specific MOPR exception from PJM. As described by FERC, the MOPR:

> is the mechanism that seeks to prevent the exercise of buyer market power in the forward capacity market by ensuring that all new resources are offered into PJM's Reliability Pricing Model (RPM) on a competitive basis. The MOPR imposes a minimum offer screen to determine whether an offer from a new resource is competitive. We continue to conclude that the MOPR serves a critical function to ensure that wholesale prices are just and reasonable and should elicit new entry when new capacity is needed. The long-term viability of the PJM market demands an assurance of competitive offers from new entrants.

PJM Interconnection, L.L.C., 137 FERC ¶ 61,145, at *4 (2011).

On March 7, 2012, CPV filed a unit-specific MOPR exception proposing a bid floor of $13.95/MW-day. *See generally* D.173 (CPV MOPR Exception Request).

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[41] CONE is a PJM-determined analysis as to the generic cost of a new power plant to enter the market. The Net CONE is the amount of annual revenue requirements from the capacity market that a new generic generator would need, assuming the plant will earn money from energy and ancillary service markets. *See* Tr. Mar. 7 (AM) at 92:9-93:23 (Knight).

Pursuant to PJM's tariff, PJM must review a submitted unit-specific exception "to determine if it's consistent with competitive cost-based fixed nominal levelized [CONE]." Tr. Mar. 7 (AM) at 96:12-97:23 (Knight). PJM's independent market monitor made the initial determination that CPV's unit-specific costs precluded it from bidding below $136.87/MW-day. *See id.* at 98:15-103:23. On April 10, 2012, CPV requested a separate determination from PJM. One month later, on April 20, 2012, PJM approved a bid floor of $96.13/Mw-day for CPV because the offer was "'consistent with the competitive, cost-based, fixed, net cost of new entry were the resource to rely on solely on revenues from PJM-administered markets' as required by [the] PJM Tariff." D.265 (PJM Decision).

In accordance with PJM's unit-specific determination, CPV submitted a bid into the 2012 BRA of $96.13/MW-day for the amount of 661 MW for the delivery year 2015/2016. In SWMAAC and MAAC, the market clearing price for the 2012 BRA was $167.46/MW-day. Hence, CPV cleared the BRA. After the 2012 BRA results were released, PJM performed a sensitivity analysis. *See* Tr. Mar. 4 (PM) at 22:23-24, 24:23-24 (Carretta). In the sensitivity analysis, PJM calculated that if the offered supply of capacity had been decreased in SWMAAC by 750 MW from the bottom of the supply stack or curve, the resulting clearing price for capacity in SWMAAC would have been $195.00/MW-day instead of $167.46/MW-day. *See id.* at 24:23-25:6; Tr. Mar. 5 (PM) at 135:13-140:6 (Cudwadie).

III. DISCUSSION

A. Supremacy Clause (Count I)

1. Legal Principles

The Supremacy Clause of the United States Constitution renders federal law "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. "The Supremacy Clause is grounded in the allocation of power between federal and state governments . . ." *Md. Pest Control Ass'n v. Montgomery Cnty., Md.*, 884 F.2d 160, 162 (4th Cir. 1989) (per curiam). Rooted in the Supremacy Clause and its recognition of a hierarchy of federal and state power is the doctrine of preemption. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992). Pursuant to the doctrine of preemption, "[i]t is a familiar and well-established principle that the Supremacy Clause invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-13 (1985) (internal citation omitted) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824)). Accordingly, the doctrine of preemption is a limitation on state power stemming from the recognition in the U.S. Constitution of a dual system of government where the national government reigns supreme. *See Anderson v. Sara Lee Corp.*, 508 F.3d 181, 191 (4th Cir. 2007) (explaining that "'federal statutes and regulations properly enacted and promulgated can nullify conflicting state or local actions") (citation omitted).

Preemption of state action through federal law can occur as the result of: (1) "the Constitution itself," (2) "a valid act of Congress," and/or (3) "regulations duly promulgated by a federal agency." *City of Charleston, S.C. v. A Fisherman's Best, Inc.*, 310 F.3d 155, 168-69

(4th Cir. 2002). "Yet '[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.'" *S. Blasting Servs., Inc. v. Wilkes Cnty., N.C.*, 288 F.3d 584, 589-90 (4th Cir. 2002) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). This presumption (of a lack of congressional intent to displace state law) is strongest when "Congress has 'legislate[d] . . . in a field which the States have traditionally occupied.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (alteration in original) (citation omitted). "[A]n 'assumption' of nonpre-emption is not triggered when [a] State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000).

However, even in a traditionally state-occupied realm, the Supremacy Clause empowers Congress to preempt or supersede state or local law, either expressly through explicit statutory language or impliedly through field or conflict preemption. *See Hillsborough Cnty.*, 471 U.S. at 713; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983) ("'Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'") (citation omitted); *Anderson*, 508 F.3d at 191-92. "Accordingly, '[t]he purpose of Congress is the ultimate touchstone' of pre-emption analysis." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (alteration in original) (citations omitted).

2. Field Preemption

Plaintiffs contend that the Generation Order impermissibly invades a field occupied exclusively by FERC—the regulation of wholesale energy and capacity sales, including the price at which such sales

are made—because the Generation Order sets the wholesale price *received* by CPV for its capacity and energy sales into the PJM Markets. Defendants assert that the Generation Order falls within the area of electric energy regulation not only traditionally occupied by the states, but also explicitly reserved to the states in the Federal Power Act ("FPA").

As discussed *supra*, preemption of state law may be express, *i.e.*, explicitly provided for by the federal statue in question, or implied. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). One type of implied preemption is field preemption. Field preemption occurs "where Congress has legislated comprehensively, thus occupying an entire field of regulation." *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368 (1986). Thus, "state law is [field] pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

The congressional intent essential for a field preemption claim can be found in

> [A] "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

English, 496 U.S. at 79 (alterations in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 (1947)). Generally speaking, "if Congress evidences an intent to occupy a given field, any state

law falling within that field is preempted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983).

Accordingly, assessment of Plaintiffs' field preemption claim requires a determination of whether Congress intended the federal government to regulate exclusively the field of wholesale energy and capacity sales and, if so, whether the Generation Order can be said to have regulated in that field.

Plaintiffs assert that through the FPA, "Congress has made plain its intention" for FERC to occupy exclusively "the field of wholesale sales of electric power, including the prices at which those sales occur." Pls.' Post-Trial Br. [Document 144] at 12-13. Though not necessarily disputing that Congress intended FERC to regulate exclusively some of the field of wholesale energy and capacity sales, Defendants maintain that the Maryland PSC acted within the jurisdiction reserved to the states by Congress under the FPA, and that therefore, the PSC could not have invaded any field occupied by FERC.

By enacting the FPA and other related laws, Congress created a division between federal and state authority within the broad field of electric energy regulation. As discussed supra, this division was somewhat necessitated by the Supreme Court's holding in *Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)[42] that the dormant Commerce Clause prohibited states from regulating the rates for wholesale power sales between utilities in different states. *Cf. First Iowa Hydro-Elec.*

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[42] *See Quill Corp. v. N.D. By & Through Heitkamp*, 504 U.S. 298 (1992) (recognizing abrogation of *Attleboro* on other grounds).

Co-op. v. Fed. Power Comm'n, 328 U.S. 152, 167-68, 171 (1946) (interpreting the FPA as mandating divided powers and "a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter").

In the FPA, Congress declared:

> Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States

16 U.S.C. § 824(a).

In line with this dual federal/state regulatory regime, pursuant to the FPA, FERC has jurisdiction over "the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce,"[43] but *not* over "any other sale of electric energy." *Id.* § 824(b)(1). Additionally, the FPA grants FERC jurisdiction over all facilities for the transmission and wholesale sales of electric energy in interstate commerce, but not "over facilities used for the generation of electric energy." *Id.* § 824(b)(1).

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[43] The "'sale of electric energy at wholesale' means a sale of electric energy to any person for resale." 16 U.S.C. § 824(d).

Though it creates a federal role, the FPA explicitly "preserve[d] state jurisdiction" over certain areas of the electric energy regulation field, including, but not limited to, regulation concerning the siting and construction of physical facilities used for the generation of electric energy.[44] *See New York v. F.E.R.C.*, 535 U.S. 1, 22-24 (2002). Where Congress has explicitly recognized a role for the states, there can be no serious assertion that the structure and framework of the FPA expresses a clear and manifest intent on the part of Congress to displace completely state authority vis-à-vis physical generation facilities (distinct from those facilities' wholesale energy sales and transmissions) and the construction thereof. Of course, given the dual federal/state regulatory regime, the division of power regulation labor may not always be clear, because, for example, FERC's regulatory actions relating to wholesale energy sales are surely capable of seeping into issues that surround the emergence of generation facilities. *See, e.g., Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 355-56 (1988) (finding that FERC's order requiring a power company to purchase 33% of the output of a newly constructed power plant at a rate determined by FERC to be just and reasonable preempted the state PSC from "examining the prudence" of the construction of the power plant in calculating rates chargeable to a retail customer by the power company to recover the cost of its purchases from the new power plant). In any event, Plaintiffs do not contend that an act of the Maryland General Assembly or PSC related to the siting or building of a physical generation facility, the

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[44] However, FERC obviously has jurisdiction over a facility's market actions to the extent the facility engages in wholesale energy and capacity transmission and sales.

direct financing of the construction of a power plant, or the encouragement of or limitations on certain types of power plants within its borders (such as environmental-related regulation) would be field preempted by the FPA.[45] Rather, Plaintiffs take the more narrow position that the field of wholesale electric energy sales and price setting is exclusive to FERC and that the regulatory means by which the PSC sought to bring about the construction of a new power plant in Maryland invaded this field.

The preservation of state authority in a carved-out area within a broader federal regulatory field does not eliminate the exclusive federal jurisdiction over the balance of the field. *See generally Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983) (explaining that "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states"). Indeed, structuring a statutory scheme so as to divide state and federal authority within one regulatory realm could be viewed as indicating that Congress intended the "federal side" of the field to be regulated exclusively by the federal government.

In regard to electric energy regulation, through the FPA Congress vested FERC with authority over wholesale electric energy prices. The FPA provides that:

> All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of

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[45] Of course, Plaintiffs would likely argue that there could be circumstances in which such action would be conflict preempted and/or violate the dormant Commerce Clause.

> electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

16 U.S.C. § 824d(a). A "public utility" is defined as "any person who owns or operates facilities subject to the jurisdiction of the Commission." *Id.* § 824(e). A power plant that engages in wholesale electric energy sales and interstate transmission would fall within the definition of a public utility.

To ensure the just and reasonableness of wholesale electric energy rates, the FPA implements a regulatory framework that vests FERC with authority to determine the lawfulness of wholesale energy rates or prices. *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 172 (2010). Under the present regulatory scheme, wholesale energy prices are generally established in the first instance by public utilities, either unilaterally through tariffs or through contracts between wholesale sellers and buyers. *Id.* Such rates or prices must be filed with FERC and are lawful only if "'just and reasonable.'" *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 531 (2008). "Rates may be examined by [FERC], upon complaint or on its own initiative, when a new or altered tariff or contract is filed or after a rate goes into effect." *NRG Power Mktg.*, 558 U.S. at 171 (citing §§ 824d(e), 824e(a)). "Following a hearing, [FERC] may set aside any rate found 'unjust, unreasonable, unduly discriminatory or preferential,' and replace it with a just and reasonable

rate." *NRG Power Mktg.*, 558 U.S. at 171 (quoting § 824e(a)).

Wholesale electric energy rates include energy prices as well as capacity prices, which "are a large component of wholesale rates." *See Miss. Indus. v. F.E.R.C.*, 808 F.2d 1525, 1541 (D.C. Cir. 1987), *vacated in part on other grounds*, 822 F.2d 1104 (D.C. Cir. 1987); *see also Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 43, n.1 (2003) ("Where, as here public utilities share capacity, the allocation of costs of maintaining capacity and generating power constitutes 'the sale of electric energy at wholesale in interstate commerce.'" (quoting § 824(b)(1))).

As stated by the Supreme Court:

> FERC has exclusive authority to determine the reasonableness of wholesale rates. It is now settled that "'the right to a reasonable rate is the right to the rate which the Commission files or fixes, and, ... except for review of the Commission's orders, [a] court can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.'"
>
> . . . .
>
> Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable.

Miss. Power & Light, 487 U.S. at 371, 374 (alteration in original) (quoting *Nantahala Power & Light Co. v.*

Thornburg, 476 U.S. 953, 960, 957 (1986) (noting that FERC has "exclusive jurisdiction over wholesale power rates")); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 580-82 (1981) (finding that state breach-of-contract claim was preempted by FERC's exclusive jurisdiction on the grounds that the state court's interpretation of terms could interfere with FERC rates); *see also Pub. Util. Dist. No. 1 of Snohomish Cnty. v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 758 (9th Cir. 2004) (acknowledging FERC's "exclusive jurisdiction over interstate sales of wholesale electricity"); *Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 812 F.2d 898, 902 (4th Cir. 1987) ("FERC's jurisdiction over interstate wholesale rates is exclusive.").

Accordingly, it appears well accepted that Congress intended to use the FPA to give FERC exclusive jurisdiction over setting wholesale electric energy and capacity rates or prices and thus intended this field to be occupied exclusively by federal regulation. Thus, state action that regulates within this field is void under the doctrine of field preemption.[46]

a. The Generation Order

Plaintiffs contend that the PSC has impermissibly regulated in the field of wholesale electric energy price setting because the Generation Order effectively sets

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[46] The preemptive effect of the FPA on the Generation Order does not depend on whether FERC intended to preempt the actions of the PSC in this case. *See generally N. Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 824 (8th Cir. 2004) ("The preemptive effect of the [Natural Gas Act] does not depend on whether the FERC intends to preempt state authority."). However, FERC has acted pursuant to its exclusive authority by determining that the rates set by the PJM Markets and ultimately received by generation facilities that participate in such markets are just and reasonable.

the price received by CPV for its wholesale energy and capacity sales to PJM in the PJM Markets. Defendants contend the Generation Order does not "set wholesale prices" because it is a purely financial arrangement that secured the construction and development of a new generation facility in Maryland.

(i) Purpose of the Generation Order

Defendants take the position that the Court cannot, or at least should not, construe the PSC's regulatory action in connection with the Generation Order as invading the exclusive field of FERC because the Order sought to secure the construction of a generation facility, an act within the jurisdiction reserved to the states under the FPA.

The Court agrees with Defendants' position that the FPA preserved states' jurisdiction over certain direct regulation of physical generation facilities. For instance, it appears that the states hold the authority to do the following: (1) take regulatory action to require existing generation facilities to retire; (2) limit the type or amount of generation facilities constructed in the state; (3) promote certain environmentally desired types of generation facilities; and (4) determine the siting or location of a new generation facility within the state. *See* 16 U.S.C. § 824(b)(1); *Conn. Dep't of Pub. Util. Control v. F.E.R.C.*, 569 F.3d 477, 481 (D.C. Cir. 2009). The Court can accept Defendants' position that FERC and/or PJM cannot directly order the construction of a new generation facility, let alone require or direct a state to permit such construction to occur within its borders. *See* Tr. Mar. 5 (PM) at 21:1-14, 82:4-21 (Nazarian); Tr. Mar. 6 (AM) at 44:1-21, 46:12-47:7 (Massey); Tr. Mar. 7 (AM) at 32:10-21 (Wodyka). The Court also can accept the position that the State of Maryland has a legitimate interest and

federally permissible role in securing an adequate supply of electric energy for Maryland residents in the present and in the future. *See* 16 U.S.C. § 824o(i); Md. Code Ann., Pub. Util. § 5-101(a).

Yet after a generator physically comes into existence and operation and participates in the wholesale electric energy market, the prices or rates received by that generator in exchange for wholesale energy and capacity sales are within the sole purview of the federal government. While Maryland may retain traditional state authority to regulate the development, location, and type of power plants within its borders, the scope of Maryland's power is necessarily limited by FERC's exclusive authority to set wholesale energy and capacity prices under, *inter alia*, the Supremacy Clause and the field preemption doctrine. Based on this principle, Maryland cannot secure the development of a new power plant by regulating in such a manner as to intrude into the federal field of wholesale electric energy and capacity price-setting. Furthermore, Maryland's stated purpose to use the Generation Order to secure the existence of sufficient and reliable electric energy for Maryland residents does not permit invasion into a federally occupied field. Where a state action falls within a field Congress intended the federal government alone to occupy, the good intentions and importance of the state's objective are immaterial to the field preemption analysis. Field preemption requires the state to "yield to the force of federal law . . ., notwithstanding that [the state's action] is constructed upon values familiar to many and cherished by most, and notwithstanding that it may fit neatly within or alongside the federal scheme." *See French v. Pan Am Exp., Inc.*, 869 F.2d 1, 6 (1st Cir. 1989).

Defendants maintain that the Generation Order cannot be field preempted because states may take a variety of actions to incentivize the development of generation facilities that affect wholesale energy and capacity prices without infringing on FERC's jurisdiction. The Court does not doubt that state action that promotes the development of power plants contemplated to participate in the wholesale energy market would not be field preempted merely because the action—by increasing the supply of available energy and capacity—affects wholesale energy and capacity prices in the PJM Markets. Indeed, Plaintiffs do not contend that the Generation Order is field preempted solely because it will have an effect on wholesale prices. Rather, Plaintiffs assert that the Generation Order is field preempted because it seeks to secure new generation by setting or establishing the prices to be received by CPV for its wholesale energy and capacity sales in the PJM Markets for the next twenty (20) years.

Therefore, the Court rejects Defendants' position that because the Generation Order sought to accomplish an objective within the purview of state jurisdiction contemplated by the FPA, the Order cannot be held to be field preempted. It is the means by which the PSC sought to secure a new generation facility that Plaintiffs challenge as field preempted, not the securing of the facility itself or the purpose for taking action to do so. Consequently, the fact that the Generation Order secured the construction of a generation facility capable of serving the electric energy needs of Maryland is not determinative of the field preemption issue. The Court must assess whether the compensation mechanism, the CfD, impermissibly set wholesale prices for CPV's energy and capacity sales into the PJM Markets.

(ii) The Contract for Differences

The price or rate received by CPV or by any generation resource within the PJM region for energy and capacity sales to PJM in the PJM Markets is regulated exclusively by FERC under the FPA. PJM sets the prices received by generators for sales into the PJM Markets through market-based auction processes that are filed with, and approved by, FERC. The heart of the parties' dispute relates to whether the PSC has effectively "set the wholesale prices" that CPV will receive for its energy and capacity sales into the PJM Markets by issuing the Generation Order, which requires the Maryland EDCs to enter into the CfD with CPV. In essence, the CfD permits CPV ultimately to recover its proposed "contract price"—accepted and approved by the PSC in the Generation Order—for energy and capacity sales into the PJM Markets.

Allegedly impermissible wholesale rate setting by a state usually occurs with respect to the demand side of the energy market. That is, a state takes direct or indirect action that effectively alters the rate paid by an LSE for wholesale energy and capacity purchases by exercising jurisdiction over retail sales to preclude such a regulated utility from passing FERC-mandated wholesale rates through to retail consumers. *See, e.g.*, *Miss. Power & Light*, 487 U.S. at 371-72 (recognizing the "filed rate doctrine," a subset of field preemption, which ensures that regulated utilities can recover the costs incurred by payment of just and reasonable FERC-determined rates from retail customers). However, the instant case relates to an action that affects the wholesale supply side of the energy market because the CfD deals with a rate for wholesale energy sales received by CPV, a generator. The Court does not

perceive, for purposes of field preemption, any meaningful difference between state actions directed to the demand side and those directed to the supply side of the wholesale energy market. The foundation that FERC has exclusive authority to determine the reasonableness of wholesale rates and that, therefore, state regulation of such matters is void under the Supremacy Clause, holds firm whether the rate or price in question is that received by a generation facility for wholesale sales or is that paid by an LSE for wholesale purchases.

Pursuant to the CfD, CPV agreed to, *inter alia*:

- "[C]onstruct, own, operate, and maintain" a generation facility "physically located entirely within the Southwest MAAC;"
- "[W]arrant[] that the Facility . . . will participate in and offer [its output and products] into all PJM Markets . . . including but not limited to the BRA, the Day-Ahead Energy Market, Real-Time Energy Market and the Ancillary Services Market consistent with PJM Rules;"
- Not enter into any "bilateral contract or other arrangement to sell any of its output, products or services, . . . with another third party, PJM, or any Government Agency during the Term of the Agreement, unless approved by the [PSC];"
- Beginning on the Commercial Operation Date, have the generation facility offer and participate in the PJM Wholesale Energy Market and Capacity Market and submit only cost-based offers; and

- Engage in a monthly compensation scheme with the Maryland EDCs based upon a comparison of the revenue received by CPV for its actual sales of energy and capacity into the PJM Markets and the "contract price" for energy and capacity provided for in the CfD.

P.2 (2011 RFP), Attachment 8 (Sample CfD) at 18, 19, 32, 33.

Under the compensation scheme outlined in the CfD, CPV is guaranteed to receive the "contract price" for each unit of energy and capacity it sells to PJM in the PJM Markets up to a ceiling quantity of 661 MW. The contract price is a dollar figure assigned to a unit of energy and capacity.[47] CPV configured and proposed the contract price to the PSC as part of its proposal, and the PSC adopted and accepted CPV's contract price in the Generation Order.[48] The compensation

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[47] The contract price for energy is different and separate from the contract price for capacity.

[48] The Court finds unpersuasive Defendants' contention that the contract price is a competitive market price because CPV initially proposed that price as part of the RFP. In the RFP, CPV bid the contract price it was willing to receive for its energy and capacity sales into the PJM Markets in exchange for developing and operating a generation facility in SWMAAC and selling the facility's output (up to 661 MW) in the PJM Markets. The contract price became operative only after reviewed, evaluated, and accepted by the PSC in an agency order. Testifying based upon his involvement in the selection process, former PSC Chairman Nazarian testified that the contract price accepted by the PSC in the Generation Order represented a unilateral decision by the PSC, and that under the RFP guidelines, the PSC had reserved the right to select none of the proposed contract prices. Tr. Mar. 5 (AM) at 122:3-123:6 (Nazarian). Accordingly,

scheme operates through a monthly netting mechanism that calculates the volume of units sold by CPV into the PJM Markets and then compares the market price actually received by CPV for the units it sold to PJM with the contract price for the same amount of units. *See id.* at 38, 88-94. If the aggregate market price received by CPV for its actual energy and capacity wholesale sales is less than the contract price, then the Maryland EDCs must pay CPV the difference. If the aggregate market price received by CPV for its energy and capacity wholesale sales is more than the contract price, then CPV must pay the EDCs the difference. *Id.* at 38. Any loss or gain to the Maryland EDCs is passed onto Maryland SOS ratepayers in the form of a rate increase or rate credit.

The following chart, using completely hypothetical numbers, illustrates the compensation mechanism employed by the CfD:

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although it was proposed by CPV, the contract price in the CfD is a price "set" or "determined" *by* the PSC.

	Energy	Capacity	Total ($)
Total Units Sold to PJM in PJM Markets in One Month by CPV	2000[49]	3000[50]	
Contract Price per Unit	100[51]	120	
Market Price per Unit	50[52]	75[53]	
CPV Market Revenue (Units Sold * Market Price)	$100,000.00	$225,000.00	$325,000.00
Contract Payment Stream (Units Sold * Contract Price)	$200,000.00	$360,000.00	$560,000.00
Payment from EDC to CPV:	$100,000.00	$135,000.00	$235,000.00
Payment from CPV to EDC:	$0	$0	$0

[49] This represents the total amount of energy dispatched by CPV into the PJM Energy Market during a one-month period.

[50] Capacity that clears the RPM is sold or offered in MW-days. The total amount of capacity sold during any one month would be the capacity offered (100 MW-days) multiplied by the number of days in the month (30).

[51] The contract price per unit is comprised of the Indexed Variable O&M (VOMe), $/MWh, Heat rate, MMBtu/MWh, and the Gas Index Price, $/MMBtu (the average of the daily Gas Price Index). The contract per unit energy price or the "strike price" is the indexed VOM + [Heat rate * Gas Index Price]. As explained by Plaintiff's witness, the heat rate multiplied by the gas index price converts the gas price from dollars per BTU into dollars per MWh. Then, the variable O&M expenses are added to that number. Tr. Mar. 4 (PM) at 82:7-20 (Cudwadie).

[52] This price would be the average energy price, or the sum of hourly market energy revenue divided by total energy dispatched.

[53] The market price for capacity would be the capacity price set in the RPM auction.

Pursuant to the terms of the CfD, assuming that CPV clears the BRA, for each unit of capacity and energy CPV actually sells to PJM in the PJM Markets (up to a ceiling amount), CPV will ultimately realize or be compensated according to the "contract price" set by the PSC in the Generation Order and not according to the market-based rates set in the FERC-approved PJM Markets. Thus, the Generation Order fixes the monetary value of the energy and capacity generated by CPV's facility and actually sold by CPV into the PJM Markets. The monetary value of CPV's wholesale energy and capacity sales dictated by the PSC in the Generation Order is determined outside of the auction mechanisms approved by FERC and utilized by PJM.

Accordingly, the Court finds that the Generation Order, through the CfD, establishes the price ultimately received by CPV for its actual physical energy and capacity sales to PJM in the PJM Markets. However, under field preemption principles, the PSC is impotent to take regulatory action to establish the price for wholesale energy and capacity sales. FERC has exclusive domain in that field and has fixed the price for wholesale energy and capacity sales in the PJM Markets as the market-based rate produced by the auction processes approved by FERC and utilized by PJM.

(iii) Alleged Mere Financing Arrangement

Defendants assert that despite the fact that the CfD's compensation mechanism provides CPV with the contract price for its actual capacity and energy sales to PJM in the PJM Markets, the Court cannot consider the Generation Order field preempted because the Order is a mere financing arrangement outside the jurisdiction of FERC. According to

Defendants, the contract price represents CPV's "revenue requirements . . . to construct a power plant," and therefore, any payments between the EDCs and CPV are in return for CPV's construction of a generation facility and not for the sale of energy and capacity. Defs.' Post-Trial Br. [Document 146] at 19-20, 22.

The evidence established that CPV formulated the contract price it submitted in response to the RFP based upon, *inter alia*, the cost of constructing the proposed Charles County Facility. But, the financial considerations taken into account by CPV when computing the contract price go beyond recouping the costs for physically constructing a generation facility. Mr. Knight, a representative of CPV, testified that CPV formulated the contract price submitted to the PSC based upon its calculation of the annual revenue requirement necessary for CPV to construct the facility, operate the facility going forward, and receive a reasonable return on the project. Tr. Mar. 7 (AM) at 122:15-123:19 (Knight). Indeed, evidence was presented that the same types of financial concerns or factors are taken into account by an existing generation resource when formulating the price at which it is willing to bid into the BRA. *See id.* at 129:5-130:7. As Mr. Knight explained, the CfD exchanged the "unknown or variable energy prices" received in the PJM Markets for the fixed contract price, and, from CPV's perspective, all CPV needed to know was that the contract price plus the minor profit it estimated from ancillary services "covers our total costs on a forward going basis." *Id.* at 124:16-21. The evidence establishes that the contract price represents a fixed revenue stream for actual energy and capacity sales into the PJM Markets that replaces the non-fixed wholesale market revenue that CPV would otherwise

depend upon to finance and operate a power plant, *i.e.*, to pay for the costs of construction, operating, capital, etc.

Based on the foregoing, the Court finds that the market revenue for wholesale energy and capacity sales into the PJM Markets and the contract price under the CfD serve basically the same goal: incoming revenue that enables CPV's facility to exist, operate, and dispatch electric energy into the PJM region. Consequently, the variables used by CPV to configure the contract price submitted to and accepted by the PSC in the Generation Order do not support Defendants' position that the CfD is limited to a financing arrangement outside the reach of FERC and is therefore incapable being field preempted.

The CfD is not a purely financial contract, financial hedging agreement, or swap agreement,[54] as those terms are commonly understood in the energy or financial industry. The Court finds credible and reliable the expert testimony of Mr. Cudwadie. Mr. Cudwadie explained that participants in the financial market enter into contracts that in essence bet on what the market price of energy or capacity (or any other article of commerce) will be at some defined point(s) in the future in reference to some market pricing index. *See* Tr. Mar. 4 (PM) at 76:11-77:13 (Cudwadie). Using an example provided by Mr.

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[54] A swap agreement is a specific type of purely financial contract or financial hedging agreement. *See* Tr. Mar. 4 (PM) at 63:11-13 (Cudwadie). Industry participants may also label a swap agreement as a contract for differences. *See id.* at 63:3-10. To avoid confusion with the "CfD", the Court shall simply refer to such financial arrangements as swap agreements.

Cudwadie, a hypothetical (and oversimplified) swap agreement for energy prices works as follows:

- A and B enter into a swap agreement for 50 MW of electric energy for 10 hours for tomorrow ("Day X") at a price of $40 using the settlement index of PJM West. The amount of MW that would be subject to the swap would be 500 (10 hours * 50 MW).
- The fixed price under the swap is $40. The floating price is based upon the market or actual energy sales on Day X (*i.e.*, PJM West pricing index that shows prices for actual real time energy sales), and thus will not be known until delivery on Day X. The floating price is used to create a settlement price.
- Under the swap, A is the "seller" and is betting that prices are going to be lower than $40, and B is the "buyer" and is betting prices will be higher than $40. Stated differently, A is hypothetically selling 500 MW of power at the floating price to B and B is simultaneously hypothetically selling 500 MW of power at the fixed price to A. Therefore, if the fixed price is higher than the floating price, A will hypothetically be entitled to receive a payment upon settlement.
- On Day X, PJM posts the 10 hours of real time prices for energy on its PJM West index, which shows a market price of $38. Thus, the settlement price is $38.

- Because the settlement price is below the fixed price, B owes $1,000 to A ([$40-$38] * 500).[55]

See id. at 63:14-65:25.

Though swap agreements refer to "buying" and "selling," those terms are used in relation to how the agreement settles—who "wins," and how much, based upon the agreed fixed price and the actual floating price. *Id.* at 65:22-25. Thus, A (seller) and B (buyer) agree to use a fixed price of $40 at the conclusion of the contract period for a hypothetical sale of 500 units. If the actual (floating) price is $38, A (seller) "wins" and is entitled to receive $1,000 from B (buyer). There is no actual delivery or receipt of energy as between A and B. *See id.* at 66:1-20. Furthermore, there is no contractual requirement between A and B that either party actually sell or deliver energy to a third party in order to receive payment under the swap. *Id.* at 66:6-69:16. Because the swap is a purely financial arrangement, the parties to the agreement could be participants in the financial market that have no ownership interest in, or economic relation to, any facility that buys or sells electric energy in the wholesale market. *See id.* at 66:24-67:1.

Participants in the energy industry may enter into swap agreements as a financial hedge for actual energy transactions conducted independently with third parties in the market. *Id.* at 67:6-9, 68:24-69:16. Thus, a party intending to purchase energy can guarantee that it will cost $40 per unit by entering into

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[55] The same result would be reached if the amount was computed by calculating the selling price for A ($19,000) and the selling price for B ($20,000). Because B will be paying more to A, A makes $1,000 in the transaction after a setoff.

a swap transaction. If the actual market price is $42, the party pays $42 for the energy but receives $2 from the hedge transaction, making its net cost $40 per unit. If the actual market price is $38, the party will pay $38 for the energy but an additional $2 to the other side of the hedge transaction, also making its net cost $40 per unit. Payment under the swap agreement is not conditioned upon actual physical sales or deliveries into the energy market. *Id.* at 69:22-70:13. As a result, the swap agreement on its own has no contractual effect or relation to the swap parties' behavior in the market upon which the deal is based because the swap agreement is not a real sale of a tangible product.

The Court agrees with Mr. Cudwadie that the CfD is critically distinguishable from a swap or similar agreement and cannot be categorized as a "purely financial arrangement" as that term is commonly understood in the energy industry. Unlike the swap agreement described above, the CfD: (1) obligates CPV to construct and operate the generation Facility; (2) requires CPV to participate and offer that Facility's output into the PJM Markets; (3) dictates the manner in which CPV participates in the PJM Markets, (4) mandates a financial settlement only if CPV clears the BRA in any given year; and (5) determines the amount of settlement based on CPV's physical energy and capacity sales into the PJM Markets. *See id.* at 94:12-98:14. Indeed, because the CfD requires CPV to bid and clear the BRA at a price different from the amount that CPV will actually receive, the CfD directly affects the market price. Accordingly, the Court finds that the CfD does not constitute a pure financial contract of the type used by participants in the energy market for hedging purposes. Consequently, the Court rejects Defendants' position

that the CfD is not field preempted because it amounts to a non-FERC jurisdictional financial swap agreement.[56]

Defendants' contend that the compensation mechanism implemented by the CfD does not regulate in an exclusively federal field because any payments to CPV are in return for CPV's construction of the Facility and not for energy and capacity sales into the PJM Markets. That is, because the payment mechanism to CPV is for the construction of the Facility and not for CPV's wholesale energy and capacity sales, the payment scheme does not impinge on FERC's exclusive jurisdiction to set wholesale energy and capacity prices. An obvious aspect and objective of the CfD is, of course, the construction of the Facility by CPV. As all parties agree, and as is plain from the terms of the CfD, there could be no payment to CPV under the CfD if the Facility was never built or was never operational. Nevertheless, the Court finds that the payment scheme to CPV under the CfD is in return, at least in part, for CPV's wholesale sales of capacity and energy in the PJM Markets.

First, the compensation scheme orchestrated by the PSC in the CfD renders payment directly contingent upon CPV's clearing capacity in the BRA. If CPV does not clear any capacity in the annual BRA, then it gets

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[56] Defendants seek to utilize the contract between PPL and Longview Power LLC (the "PPL Longview Contract") to assert that the CfD is not field preempted. The PPL Longview Contract is not before this Court for review. Thus whether or not one of the Plaintiffs entered into a state-mandated contract that shares similar components with the CfD is not controlling as to whether the CfD is field preempted. In addition, Defendants have not presented any sort of estoppel position.

nothing under the CfD. Specifically, "[n]o Monthly Payment shall be provided during any period in which [CPV] has not been selected to provide capacity in PJM's BRA." P.2 (2011 RFP), Attachment 8 (Sample CfD) at 37. Even if CPV constructs and operates the Charles County Facility, CPV will receive no payment under the compensation scheme if it does not clear capacity in the BRA. Yet, a power plant that does not clear the BRA may still sell its electric energy to PJM in the PJM Wholesale Energy Market. *See* Tr. Mar. 8 (AM) at 13:19-14:2 (Willig). The clearing pre-condition in the CfD rewards CPV for clearing the BRA because CPV only obtains the contract price for wholesale energy and capacity sales into the PJM Markets if the CPV bid clears. Thus, the Court finds that the CfD's payment scheme compensates CPV, in part, for making wholesale capacity sales to PJM in the PJM Wholesale Capacity Market.

A second illustration of how the contract price compensates CPV for its wholesale energy and capacity sales into the PJM Markets is provided by the way in which monthly settlements are calculated under the CfD. If CPV clears the BRA, the pricing terms in the CfD are linked directly to the quantity of energy and capacity sold from the CPV Facility into the PJM Markets. Mar. 7 (PM) at 11:11-13:3, 16:20-17:7 (Knight). As discussed *supra*, CPV is compensated based upon how much capacity and energy it actually sells to PJM in the PJM Markets up to a ceiling figure. As Mr. Cudwadie testified, "to get paid [CPV] ha[s] to clear the auction. That same type of principle applies to the energy market as well. If they're going to get payment under the contract, they must clear megawatts in the energy market." Tr. Mar. 4 (PM) at 98:4-8 (Cudwadie).

The Generation Order, the 2011 Amended RFP, and the CfD contain other representations that rebut the notion that the CfD does not compensate CPV for wholesale energy and capacity sales. For instance, the CfD provides that the Maryland EDCs "shall not pay for Capacity and Energy that PJM deems was not made available up to the performance standards required by PJM Agreements and PJM Tariff." *See* P.2 (2011 RFP), Attachment 8 (Sample CfD) at 38. The CfD obligates CPV to bid its 661 MW of the Facility only into the PJM Markets. *See id.* at 32. However, wholesale energy and capacity sales may occur through bilateral contracts or other arrangements outside the PJM Markets. The RFP explains that the structure of the CfD is such that "the delivery of Capacity and Energy will be settled financially rather than physically, thereby providing compensation to Supplier for Capacity and Energy." *Id.* at 5. The Court finds that the CfD compensates CPV for more than developing a new power plant. Under the CfD, the PSC has provided payment to CPV for its wholesale energy and capacity sales to PJM in the PJM Markets at a price different from that generated by the FERC-approved market auction processes implemented by PJM.

Defendants assert that the Generation Order is outside the purview of the FERC-regulated field because the CfD is not an agreement for the physical delivery or sale of energy and capacity between CPV and the Maryland EDCs.[57] The Court does not find

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[57] The CfD does contain a provision that would enable the EDCs to take title to output generated, delivered, or sold by CPV's facility:

> [The Maryland EDCs] shall not take title to or risk loss to any products or services generated, delivered, or

that the lack of physical delivery of energy *between the parties to the CfD* (CPV and the Maryland EDCs) insulates the Generation Order from a field preemption attack. If the PSC had ordered CPV to sell, at wholesale, and deliver energy to the EDCs for the contract price, then the unconstitutionality of the Generation Order would certainly be obvious. Here, the CfD provides payment in the form of the contract price to CPV based upon CPV's physical sales and delivery of energy and capacity to PJM in the PJM Markets. That is, if CPV makes no physical delivery of energy and capacity in the PJM Markets, then CPV gets no payment under the CfD. As former PSC Chairman Nazarian testified, CPV's physical delivery of energy and capacity into the PJM Markets was a central component" of the Generation Order and the regulatory actions leading thereto. *See* Tr. Mar. 5 (AM) at 17:15-22 (Nazarian). By making CPV's compensation contingent upon the number of megawatts sold in the PJM Markets up to the contract cap of 661 MW-days and by also including other provisions related to CPV's delivery of energy to PJM, the PSC sought, through the CfD, to have CPV make physical deliveries of energy to PJM and to compensate CPV with the contract price for those deliveries from CPV's facility. Accordingly, the Generation Order involves, and compensates for, CPV's delivery of energy and capacity to PJM in the PJM Markets, which provides further evidence that the CfD is not a purely financial

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sold by the Facility unless ordered to do so by the MDPSC upon the recommendation of the Buyer or Supplier. Either Party can initiate an amendment to the Agreement to require that the Buyer receive title to the Supplier's output.

P.2 (2011 RFP), Attachment 8 (Sample CfD) at 35.

contract generally considered to be outside FERC's jurisdiction. *See generally Puget Sound Energy, Inc.*, 96 FERC ¶ 63,044, 65,381 n.318 (2001) ("Commission precedent on this issue is clear—the Commission has asserted jurisdiction only over those transactions that result in the physical delivery of electricity. The Commission has jurisdiction under Sections 205 and 206 of the Federal Power Act only where three conditions are present: where '[(i)] the electricity futures contract goes to delivery, [(ii)] the electric energy sold under the contract will be resold in interstate commerce, [(iii)] and the seller is a public utility.'") (alteration in original) (quoting *N.Y. Mercantile Exch.*, 74 FERC ¶ 61,311, 61,987 (1996)).

b. CPV's Market-Based Rate Tariff Argument

Defendants contend that Plaintiffs' field preemption claim is moot because a finding of field preemption subjects adjudication of the instant matter to the jurisdiction of FERC.

CPV filed an application with FERC pursuant to Section 205 of the FPA on November 8, 2012 (and amended the application on December 4, 2012) seeking, *inter alia*, "authorization to make market-based wholesale sales of energy, capacity, and ancillary services pursuant to [an attached] market-based rate tariff." P.611 (CPV FERC Application for Market-Based Rate Authorization) at 1. On February 1, 2013, FERC approved CPV's market-based rate tariff (the "MBR Tariff"). Defendants assert that "if the CfD were a contract within FERC's jurisdiction, that contract is now authorized by FERC and controlled by the MBR Tariff [and] any complaint by Plaintiffs regarding the CfD . would have to be

directed to FERC, and not this Court."[58] Defs.' Post-Trial Br. [Document 146], at 27.

"[Market-based rate t]ariffs, instead of setting forth rate schedules or rate-fixing contracts, simply state that the seller will enter into freely negotiated contracts with purchasers." *Morgan Stanley*, 554 U.S. at 537. Contracts entered into under market-based rate tariffs need not be filed immediately with FERC. Instead, the wholesale seller must file quarterly reports summarizing the contracts into which it has entered. *Id.* A market-based rate tariff authorizes a seller to enter into bilateral transactions for resale of electric energy, capacity, or ancillary services at market-based rates." *See* 18 C.F.R. 35.36(b); Tr. Mar. 4 (AM) at 40:2-9 (Alessandrini) (explaining that market-based rate authority gives a seller "the ability to buy and sell electricity with two willing counter-parties at arm's length and at market-based rates"). However, "FERC will grant approval of a market-based tariff only if a utility demonstrates that it lacks or has adequately mitigated market power, lacks the capacity to erect other barriers to entry, and has avoided giving preferences to its affiliates." *Morgan Stanley*, 554 U.S. at 537.

As a result of its MBR Tariff, CPV has FERC approval to sell electric energy, capacity, or ancillary

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[58] Prior to trial, CPV filed the Motion to Dismiss Preemption Claims as Moot [Document 103] asserting that even if Plaintiffs were correct that the CfD is subject to FERC's jurisdiction, Plaintiffs would not be entitled to relief on their preemption claims because FERC granted CPV authority under the FPA to sell wholesale electricity pursuant to the MBR Tariff. The Court denied the motion without prejudice to the right of CPV, or of any other party, to present the mootness contention after trial [Document 110].

services at wholesale through freely negotiated contracts with purchasers, including wholesale sales made to PJM in the PJM Markets. *See* Tr. Mar. 7 (PM) at 5:4-8 (Knight) (explaining that CPV would be required to obtain market-based rate authority from FERC prior to making the sales required under the CfD to PJM). Of course, the MBR Tariff would affect only those transactions that are subject to FERC's jurisdiction.

In CPV's application for market-based rate authorization, it provided in a footnote that:

> CPV Maryland has included as Exhibit E the most current public draft of the CFD that is under view before the MPSC solely for informational purposes. The Commission has determined that financial contracts that do not provide for sales of capacity or energy are not subject to the filing and reporting requirements under Section 205 of the Federal Power Act. However, CPV Maryland is not requesting that Commission to address or discuss its jurisdiction over the contract for differences in its decision on this request for market based rates.

P.611 (CPV FERC Application for Market-Based Rate Authorization) at 4 n.7 (internal citations omitted). In its order authorizing CPV's MBR Tariff, FERC referenced CPV's above-quoted representation, but did not address the CfD as part of the proceeding for market-based rate authority, limiting its discussion to whether CPV had horizontal or vertical market power. *CPV Shore, LLC*, 142 FERC ¶ 61,081, at *7-10 (2013). FERC has not passed judgment, one way or another, on the reasonableness or fairness of the terms of CfD, whether the CfD is a "FERC-jurisdictional" contract,

or any other potential issue within its regulatory jurisdiction.

Defendants contend that a finding in favor of Plaintiffs on the field preemption claim means that FERC would have jurisdiction over the CfD and, since CPV has been granted its MBR Tariff, the only forum to debate the enforceability of the CfD is FERC. The Court does not agree.

Even if the MBR Tariff granted by FERC authorized CPV, in the first instance, to enter into the CfD with the Maryland EDCs, thereby rendering any dispute over the CfD within the primary jurisdiction of FERC, such an authorization would not by extension preclude this Court from granting relief to Plaintiffs on a field preemption claim against the Maryland PSC. Plaintiffs' Complaint seeks relief enjoining the PSC from enforcing the Generation Order, which includes the requirement that the Maryland EDCs enter into the CfD with CPV. In this action, Plaintiffs have not directly challenged the CfD (*i.e.*, the ability of the Maryland EDCs and CPV to enter into the CfD absent state directive). Plaintiffs do not seek relief against CPV and do not assert that CPV has engaged in an unlawful practice in connection with the CfD. Contrary to the situation in *Pub. Util. Dist. No. 1 of Snohomish Cnty. v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 761 (9th Cir. 2004),[59] relied upon by Defendants, Plaintiffs are not asking that this Court determine a price or rate for CPV's energy and capacity sales that would be fair. Plaintiffs also are not

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[59] In *Dynegy*, "a utility providing electricity to consumers in Washington state, has sued various generators and traders of wholesale electricity for violations of California state antitrust and consumer protection laws." 384 F.3d at 758. A state or state agency was not a party to the suit.

seeking a determination that CPV violated or breached its MBR Tariff. The Court recognizes that its determination vis-à-vis the Generation Order may have collateral consequences and give rise to the implication that the CfD is the type of agreement governed by CPV's MBR Tariff. However, such implications do not deprive this Court of jurisdiction to answer the question of whether the Generation Order as a state action is unconstitutional.

Plaintiffs have challenged the Maryland PSC's ability under the Supremacy Clause to issue the Generation Order, which directed market participants to enter into the CfD with CPV. While the Court's finding that the Generation Order is field preempted raises the implication that the CfD, standing by itself, is a FERC-jurisdictional contract as opposed to a purely financial arrangement that is generally considered outside the purview of FERC, such an implication does not strip this Court of jurisdiction to decide the constitutionality of the PSC's regulatory actions and to enjoin enforcement of an unconstitutional state action.

c. Resolution

When it issued the Generation Order, the PSC sought to ensure the continued, long-term reliability of the electricity supply to Maryland customers" by securing the construction and operation of a generation facility within SWMAAC. *See* P.2 (2011 RFP) at 1. By themselves, those actions and objectives of securing the construction and operation of a generation facility may not invade a federally occupied field and most likely do fall within the permissible realm of regulation reserved to the states under the FPA. But, the FPA recognizes limits on the permissible role of the states in regulating generation

facilities. Specifically, when generators are selling energy and capacity at wholesale, Congress intended the price or rate of such sales to be regulated exclusively by FERC. *See supra* Part III.A.2; *see also Miss. Indus.*, 808 F.2d at 1545 n.74 (explaining that "under the clear terms of the [FPA], the Commission has been awarded jurisdiction over generating facilities 'to the extent provided in other sections,' including jurisdiction necessary to effectuate regulation of interstate wholesale rates"). Because states have no authority, either traditional or otherwise,[60] to set wholesale rates, the compensation received by CPV for its wholesale energy and capacity sales is exclusively subject to the regulation of FERC. While there exist legitimate ways in which states may secure the development of generation facilities, states may not do so by dictating the ultimate price received by the generation facility for its actual wholesale energy and capacity sales in the PJM Markets without running afoul of the Supremacy Clause.

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[60] The Court does not agree with Defendants that the PSC's actions are subject to a strong presumption against preemption because states have traditionally occupied the field of regulating the construction and siting of physical generation facilities. As explained herein, the PSC's objective certainly fell within that traditional state purview continually referenced by Defendants, but the manner in which the PSC accomplished that objective involved establishing the amount received by CPV for its wholesale activity in the PJM Markets. Regulating in the field of wholesale price-setting is occupied by FERC, so therefore the strong presumption against preemption is not present. *See United States v. Locke*, 529 U.S. 89, 108 (2000). However, even if the strong presumption existed, this Court would still conclude the Generation Order unconstitutionally encroached into a federal field.

In the Generation Order, the PSC directed the Maryland EDCs to enter into the CfD with CPV. Under the CfD, CPV is guaranteed to receive the contract price—an out-of-market price set by the PSC—for its actual wholesale energy and capacity sales up to 661 MW in the PJM Markets. Based on the evidence presented at trial as discussed herein, the Court finds that the Generation Order sets or establishes the ultimate price received by CPV for these wholesale energy and capacity sales. The doctrine of field preemption forecloses state regulation in a field occupied entirely by the federal government, even if the state's purpose is admirable or the state regulation does not conflict with achievement of the federal scheme. *See Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012). Where Congress intended FERC alone to regulate wholesale energy and capacity prices, and this Court has found the Generation Order sets or establishes the wholesale energy and capacity prices to be received by CPV for its sales into the PJM Markets, the PSC has encroached upon an exclusive federal field. In line with the principles of the Supremacy Clause, the Generation Order cannot stand.

The Court finds that the Generation Order is field preempted and, therefore, is unconstitutional as a violation of the Supremacy Clause.

3. Conflict Preemption

Conflict preemption exists "where state law 'stands as an obstacle to the accomplishment and execution of the [Congress'] full purposes and objectives.'" *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (alteration in original) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941)). The Court's decision that the Generation Order violates the Supremacy Clause

because it is field preempted, renders moot the question of whether the Order would also be held to violate the Supremacy Clause because it is conflict preempted.

The Court will not undertake an academic exercise to hypothecate the findings that it would have made in a decision holding that the Generation Order is not field preempted and then hypothecate what would have been this Court's conflict preemption decision with those findings substituted for those actually made.

Accordingly, the Court simply will note that there are reasonably debatable issues as to whether the Generation Order violated the Supremacy Clause by virtue of conflict, as well as field, preemption.

B. The Dormant Commerce Clause (Count II)

As discussed herein, the Court does not accept any of Defendants' plethora of contentions that would prevent consideration of the merits of Plaintiffs' dormant Commerce Clause claim. However, on consideration of the ultimate issue, the Court does not find that the Generation Order violates the dormant Commerce Clause.

1. Legal Principles

The enumerated powers delegated to Congress by the United States Constitution include the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. "Although the Commerce Clause is phrased merely as a grant of authority to Congress . . . it is well established that the Clause also embodies a negative command forbidding the States to discriminate against interstate trade." *Associated*

Indus. of Mo. v. Lohman, 511 U.S. 641, 646 (1994). This negative aspect of the Commerce Clause, or dormant Commerce Clause, prohibits economic protectionism ("that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors") on part of the States. *See New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 271, 273 (1988) (invalidating under the dormant Commerce Clause a statute that provided a tax credit for sales of ethanol produced in Ohio but not for sales of ethanol produced in certain other states). Such state economic protectionism "violates the principle of the unitary national market by handicapping out-of-state competitors." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994).

In any dormant Commerce Clause challenge to state action, a court must determine as a preliminary matter whether the state's actions are of the type subject to the strictures of the dormant Commerce Clause. If the state's actions are not exempted from the Commerce Clause, then the court must determine whether the state has affirmatively discriminated against interstate commerce or, though regulating evenhandedly, has unduly burdened interstate commerce. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986); *McBurney v. Young*, 667 F.3d 454, 468 (4th Cir. 2012), *aff'd*, 133 S. Ct. 1709 (2013). Affirmative discrimination is subject to strict scrutiny and will be prohibited unless "'demonstrably justified by a factor unrelated to economic protectionism.'" *McBurney*, 667 F.3d at 468-69 (quoting *Brown v. Hovatter*, 561 F.3d 357, 363 (4th Cir. 2009) (explaining that it is insufficient for a dormant Commerce Clause violation that a statute provides a benefit to only state citizens and that the state action must discriminate against out-of-state economic interests). State regulation that

incidentally burdens interstate commerce is less rigorously evaluated and "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005) (quoting Pike, 397 U.S. at 142).

2. "Exemption" from the Dormant Commerce Clause

Defendants contend that the PSC's challenged actions are not covered by the strictures of the dormant Commerce Clause. Defendants contend that in connection with issuing the Generation Order, the PSC operated without Commerce Clause confinement because: (1) state spending or subsidization to advance a legitimate public purpose operates outside the Commerce Clause; (2) the PSC acted as a market participant in the new generation market; and/or (3) Congress has expressly authorized states to discriminate against interstate commerce in the siting of generation facilities.

a. State Spending or Subsidization to Advance a Legitimate Public Purpose

Defendants urge the Court to hold that the dormant Commerce Clause does not apply to the PSC's actions because, by ultimately requiring Maryland ratepayers to shoulder the financial burden of the CfD, the PSC has merely spent money to subsidize the construction of a power plant in order to advance a legitimate public purpose. *See* Defs.' Post-Trial Br. [Document 146], at 43-45. In essence, Defendants request this Court to recognize a sweeping exception to the dormant Commerce Clause that would permit a state or local

government to discriminate against interstate commerce so long as that government's actions can be categorized as spending or subsidization to advance a legitimate public purpose. For the reasons stated herein, the Court declines to do so.

Defendants' spending and subsidy contentions are separable into two distinct categories: (1) state or local spending on any matter and (2) administration of state or local subsidies or subsidy programs provided to private business. In their post-trial briefing, Defendants treat state spending generally and state administration of a subsidy program as a single class of state action wholly outside the Commerce Clause. Yet, a state subsidy is a sub-set that falls under the much broader umbrella of state or local spending.[61] The Court will address each category separately.

(i) Spending to Advance a Legitimate Public Purpose

Relying on several Supreme Court cases addressing the market participant exception and state laws that prefer public entities, Defendants contend that the Supreme Court has made clear that "governmental entities are not subject to Commerce Clause scrutiny when they spend money . . . whatever the source of the funding." *See* Defs.' Post-Trial Br. [Document 146] at 43-44. Plaintiffs assert that the Supreme Court has not recognized such an exemption and has firmly rejected the argument a state law to promote with the

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[61] In the general sense, a subsidy refers to a grant of money or other pecuniary aid by a governmental body to another, such as a private entity or group of private entities. *See W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994) (describing money distributed to Massachusetts dairy farm producers from state tax fund as a subsidy).

purpose of promoting a public benefit is necessarily insulated from the Commerce Clause. The Court agrees with Plaintiffs.

The Supreme Court jurisprudence relied upon by the Defendants does not demonstrate a separate and categorical dormant Commerce Clause exception for state activity pigeonholed as spending money to advance public health, safety, or welfare. Rather, those decisions indicate a recognition that (1) in *certain instances*, when a state or local government spends its own revenues, that government may be considered a market participant free to operate without Commerce Clause hindrance (*White v. Mass. Council of Const. Emp'rs, Inc.*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980)) and that (2) *in certain instances* a state's favoring or benefiting a government or public entity while treating all private companies without distinction does not discriminate against interstate commerce (*Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007)).

Specifically, in *White* the Supreme Court held that "[]nsofar as the city [of Boston] expended only its own funds in entering into construction contracts [to which the city was a signatory] for public projects, it was a market participant," [62] and therefore the dormant

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[62] In *White v. Mass. Council of Const. Emp'rs, Inc.*, the city executive order at issue also applied to funds received from the federal government. 460 U.S. 204, 206, 208 (1983). The Supreme Court found that to the extent the order applied to projects funded in part with funds acquired by the city through federal programs, the order had been specifically authorized by Congress and thus fell within the congressional authorization exception to the Commerce Clause. *See id.* at 212-16.

Commerce Clause placed no limitation on its ability to favor city residents in connection with those contracts.[63] 460 U.S. at 209 n.5, 214-15. In *Reeves*, the Supreme Court held that South Dakota's construction and operation of a cement plant rendered it a market participant and thus left the state free to favor South Dakota customers over out-of-state customers when selling the plant's output without implicating the dormant Commerce Clause. 447 U.S. at 439-40. With respect to public entities, in *United Haulers*, the Supreme Court held a "flow control" ordinance requiring all trash haulers to deliver solid "waste to [a 'clearly public'] facility[y] owned and operated by a state-created public benefit corporation"[64] did not discriminate against interstate commerce within the meaning of the dormant Commerce Clause.[65] 550 U.S. at 334. Similarly, in *Davis*, the Supreme Court, relying on *United Haulers*, held that Kentucky's tax exemption for state-issued bonds did not discriminate

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[63] In *White*, the executive order issued by the city "required that all construction projects funded in whole or in part by city funds should be performed by a work force consisting of at least half *bona fide* residents of Boston." *Id.* at 205-06.

[64] As to funding the facility, the defendant waste management authority collected "tipping fees" from private trash collectors to cover operating and maintenance costs, and if the costs were not recouped through the tipping fees and other charges, then the state counties served by the facility would make up the difference. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*,550 U.S. 330, 335-36 (2007).

[65] The Court reasoned that state governments are distinct from private businesses because the state is vested with the responsibility of protecting the health, safety, and welfare of its citizens." *Id.* at 342. Thus, "[l]aws favoring local government may be directed toward any number of legitimate goals unrelated to protectionism," unlike laws favoring in-state business over out-of-state business. *Id.* 343.

against interstate commerce because Kentucky treated all private bond issuers exactly the same.[66] 553 U.S. at 341-43 (recognizing that state tax exemptions for state-issued bonds were a common and historically rooted practice).

Accordingly, the Supreme Court has by no means made clear that when a state or local government spends money to advance a legitimate public purpose it is free to discriminate against interstate commerce or is considered not to discriminate against interstate commerce. Further, the PSC's actions at issue herein are entirely distinguishable from the actions at issue in the aforementioned cases. Here, the PSC is *not*: (1) spending its own funds to construct a power plant; (2) entering into a contract to which it is a signatory for the construction of a power plant; (3) owning or operating a power plant; (4) creating a clearly public entity that will own and operate a power plant; and/or (5) issuing bonds to generate state revenue to fund a power plant. To the contrary, the PSC procured a market actor, CPV, to construct, own, and operate a private facility in the interstate energy market and then used its regulatory authority to order other market actors, and ultimately Maryland ratepayers, to provide the Facility with financial backing.

Additionally, the Court does not find any basis for recognizing the general "spending exception" advocated by Defendants. Such an exception would endorse a formalistic approach to the Commerce Clause, long discouraged by the Supreme Court.

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[66] Justice Souter, who delivered the opinion of the Court in *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008), opined that the Kentucky law would also evade dormant Commerce Clause review under the market participant exception, but a majority of Justices did not join in that portion of the opinion.

See W. Lynn Creamery, 512 U.S. at 201. As the Supreme Court pointed out in the not-too-distant past: "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co., Inc. v. Maxwell*, 311 U.S. 454, 455-56 (1940). In addition to its reluctance in fashioning exemptions that place form over substance, the Supreme Court has flatly cast aside any notion that a state may regulate in a manner that discriminates or burdens interstate commerce so long as it acts for a legitimate public purpose. *See, e.g., Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 100 (1994) (explaining the "purpose of, or justification for, a law has no bearing on whether it is facially discriminatory"); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951).

The Court does not agree with Defendants' position that subjecting the PSC's actions to the dormant Commerce Clause will have severe adverse effects by raising questions as to whether commonplace state spending activity, such as a decision to fund the expansion of a state university's campus with student tuition, is permissible under the Commerce Clause. There are, of course, multitudes of state spending schemes that by their nature most likely raise no discernible Commerce Clause issue because those activities simply do not regulate commerce in any meaningful sense or fall within an already recognized Commerce Clause exception. *See Davis*, 553 U.S. at 358 (2008) (Stevens, J., concurring). Just the same, one can certainly envision state spending schemes that do give rise to significant Commerce Clause concerns. *See W. Va. Univ. Hosps., Inc. v. Rendell*,

No. 1:CV-06-0082, 2007 WL 3274409, at *9-10 (M.D. Pa. Nov. 5, 2007) (finding a Pennsylvania law that excluded all out of-state hospitals that provide trauma care to Pennsylvania residents from receiving trauma payments available to Pennsylvania hospital invalid as unjustified facial discrimination against interstate commerce).

Whether any particular state spending activity is subject to, or passes muster under, the dormant Commerce Clause will depend on the nature and contours of that particular scheme. The Court will, therefore, address Plaintiffs' claim that the specific actions taken by the PSC implicate and violate the dormant Commerce Clause.

(ii) State Subsidies

Defendants contend that the PSC's actions amount to a constitutionally permissible subsidy program not subject to dormant Commerce Clause scrutiny. Plaintiffs assert that the Supreme Court has never explicitly addressed the constitutionality of subsidy programs in connection with the dormant Commerce Clause and that, in any event, the PSC has not directly subsidized anything.

The Supreme Court has yet to decide whether or not state or local government subsidy programs are categorically outside the dormant Commerce Clause. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 589 (1997) (explaining that there was no need to address the permissibility of a state subsidy under the dormant Commerce Clause because the law at issue was a tax exemption, which, although having the same effect as subsidy, is constitutionally distinct under Supreme Court jurisprudence); *W. Lynn Creamery*, 512 U.S. at 199

n.15. However, the Supreme Court has made several statements with respect to subsidies and the dormant Commerce Clause. For instance, in *W. Lynn Creamery*, the Supreme Court stated in dicta that "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business." 512 U.S. at 198-99 (holding that a pricing program consisting of a subsidy and a nondiscriminatory tax on all dairy farmers violated the dormant Commerce Clause because the tax was effectively imposed only on out-of-state dairy farmers). In a case involving a discriminatory tax scheme, the Supreme Court stated that:

> The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does.

New Energy, 486 U.S. at 278 (1988).[67]

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[67] Reference to direct subsidies by the Supreme Court is, in some ways, rooted in the market participant exception to the dormant Commerce Clause. In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), the Supreme Court first recognized the market participant exception to the dormant Commerce Clause when sanctioning a state's cash subsidy program. In *New Energy Co. of Ind. V. Limbach*, the Supreme Court noted that simply because a "tax credit scheme has the purpose and effect of subsidizing a particular industry [t]hat does not transform it into a form of state participation in the free market" outside of dormant Commerce Clause scrutiny under the market participation exception. 486 U.S. 269, 277-78 (1988). The Court explained that although it considered the cash subsidy program

At most, the Supreme Court's statements regarding subsidies suggest that a "pure [state or local government] subsidy funded out of general revenue" or "direct subsidization of domestic industry" by a state or local government is generally permissible under the Commerce Clause.[68] The Supreme Court has not given any indication that state activity that could be labeled as an indirect subsidy or a subsidy equivalent—in that it has the purpose or effect of funding domestic business—necessarily is permissible under the dormant Commerce Clause. To the contrary, the Supreme Court has subjected state laws that have the purpose and/or effect of subsidizing only local industry to dormant Commerce Clause scrutiny. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265-66, 272 (1984) (finding that a tax exemption for certain locally produced alcoholic beverages violated the

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at issue in *Alexandria Scrap* to be proprietary activity, not all state subsidy programs necessarily fall into that characterization. *See id.* at 277; *Reeves, Inc. v. Stake*, 447 U.S. 429, 440 n.14 (1980) ("We have no occasion here to inquire whether subsidy programs unlike that involved in *Alexandria Scrap* warrant characterization as proprietary, rather than regulatory, activity."). Thus, the Supreme Court has recognized that a state *may* be considered a "market participant" free to discriminate against interstate commerce when administering a subsidy program, but that simply because a state activity is labeled as a subsidy or has that purpose or effect does not automatically render the state's actions proprietary as opposed to regulatory.

[68] However, the Supreme Court's statements do not clarify whether it considers a "direct subsidy" as: (1) an independent category of state activity exempted from the dormant Commerce Clause (*i.e.*, permitting discriminatory direct subsidies); (2) falling within the market participant exception; or (3) a type of state action that is generally not considered as discrimination or as a burden on interstate commerce.

dormant Commerce Clause even though the state's asserted purpose for the tax exemption was an attempt to subsidize financially troubled local business).[69] The Supreme Court has also refused to consider state laws that have the purpose and/or effect of subsidizing a particular industry necessarily to be a form of market participation, as opposed to a form of regulation, by the state. *See New Energy*, 486 U.S. at 277-78.

In the instant case, the PSC is not directly funding or providing pecuniary aid to a domestic business through general taxes, municipal bonds, or some other source of Maryland or PSC revenue. The PSC has elected to exercise its regulatory authority over the Maryland EDCs in such a way as to order those market actors to provide a local generation facility selected by the PSC with 20 years of financing in the form of the CfD and to permit the EDCs to recoup their losses and pass on their gains to Maryland SOS customers through increases or credits on retail electricity bills. The PSC has also opted to use the open market to earn revenues for its procured generation facility, as evidenced by the fact that any payment obligation of the EDCs, and, by extension, the Maryland ratepayers, under the CfD only arises if the generation facility actually sells its output into the interstate PJM Markets. Thus, the PSC's financing

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[69] The Supreme Court does distinguish between a direct subsidy and a tax exemption. The Supreme Court has explained that although tax exemptions and subsidies serve similar ends, "there is a constitutionally significant difference between" the two because discriminatory tax exemptions have been considered the type of state action "designed to give residents an advantage in the market place [that] is prohibited by the Commerce Clause." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 589-91 (1997).

scheme is constitutionally distinct from a direct subsidy in a dormant Commerce Clause context. *See C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 394 (1994) (explaining that where a flow control ordinance served the purpose of financing a town-sponsored facility and that since the town "elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival business from out of State" and contrasting that with a situation in which the town "subsidize[d] the facility through general taxes or municipal bonds"). Placing the ultimate financial risk of the PSC's decision to procure the construction and operation of private facility in SWMAAC on Maryland ratepayers is also distinctly different from a direct subsidization. *See Alliance for Clean Coal v. Miller*, 44 F.3d 591, 596 (7th Cir. 1995). Indeed, holding that the PSC's actions fall within the realm of subsidies noted by the Supreme Court to be "dormant Commerce Clause friendly" would render the adjectives "pure" and "direct" meaningless.

Accordingly, the Court finds the PSC's actions cannot be characterized as a direct subsidization of the construction and operation of a local generation facility, irrespective of whether direct subsidies would be permissible under the Commerce Clause.

b. Market Participant Exception

Defendants assert that the PSC, on behalf of the Maryland ratepayers, is a "financier" of a new generation facility and thus should be considered a market participant in the market for new generation facilities whose actions are therefore not subject to the dormant Commerce Clause. Plaintiffs assert the market participant doctrine is inapplicable because the PSC is

not buying or selling anything in the new generation market.

The market participant exception permits a state to discriminate against interstate commerce and prefer its own citizens when it acts as a participant in the market, and not as a regulator. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 802, 809-10 (1976) (finding that a law giving "Maryland processors an advantage over . . . non-Maryland processors in the competition for bounty-eligible hulks" was not subject to the dormant Commerce Clause where Maryland had acted as a market participant in using state monies to create and fund the "bounties" and concluding that the state was free to favor its own citizens in receiving such bounties). The Supreme Court has explained that the market participant exception makes "good sense" because "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Reeves*, 447 U.S. at 436-37 (internal citations omitted). That is, when acting as a proprietor, states, like any private business, should be able to make decisions without Commerce Clause limits. *See id.* at 439.

Under the Generation Order and the CfD, the PSC is not buying, selling, or directly paying for anything in the new generation resource market. The CfD requires the generation facility to sell its energy and capacity to PJM in the PJM Markets. As the evidence at trial demonstrated, PJM sells the energy and capacity that it purchases from generation resources to LSEs within the PJM region, including the Maryland EDCs, who then resell the energy and

capacity to Maryland end-use customers. With respect to "payment," the PSC is not a signatory to the CfD; that compensation scheme is between the generation facility and the Maryland EDCs. The EDCs have PSC authorization to pass on losses and gains under the CfD to Maryland ratepayers who pay the EDCs for retail electric sales. Under this scheme, the PSC is not acting as a proprietor or even directly participating in the free market or in a market it created, and therefore is not entitled to be treated as a private actor procuring a new generation facility for purposes of the Commerce Clause. *Cf. Brooks v. Vassar*, 462 F.3d 341, 357 (4th Cir. 2006) (finding that where Virginia elected to sell alcohol from state-owned and state-operated stores, it was a participant in the alcohol retail market and therefore could elect not to sell out-of-state wines at its stores without dormant Commerce Clause concerns). Rather, as the face of the RFP makes clear, the PSC is acting as a regulator of electric distribution companies. *See* P.2 (2011 RFP) at 1 n.1 (citing regulatory authority relied upon by PSC in issuing the RFP). The fact that this regulatory action may have the "effect of subsidizing" the operation and construction of a local generation facility, "does not transform it into a form of state participation in the free market." *New Energy*, 486 U.S. at 277.[70]

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[70] Furthermore, Defendants' contention that the PSC is acting as a market intermediary on behalf of Maryland ratepayers to finance a new generation facility and that the PSC is therefore a market participant is without merit or legal support. If the market participant exception were applicable solely because the state government propounded to be acting on behalf of its citizens (or some discrete group thereof), the exception would swallow the rule.

Accordingly, the Court finds the PSC's actions do not fall within the market participant exception.

c. Explicit Authorization from Congress

Defendants assert that the PSC's actions cannot give rise to a dormant Commerce Clause claim because Congress expressly authorized the states to regulate freely the siting of generation facilities within each respective state in Section 201(b)(1) of the Federal Power Act. 16 U.S.C. § 824(b)(1)). Plaintiffs contend that Defendants have failed to meet their burden of demonstrating a clear intent on behalf of Congress to permit states to discriminate against interstate commerce.

In exercising its authority under the Commerce Clause,

> Congress may "confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.

W. & S. Life Ins. Co. v. State Bd. of Equalization of Ca., 451 U.S. 648, 652-53 (1981) (internal citations omitted). To exempt the states from scrutiny under the dormant Commerce Clause, "Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve . . . a violation of the Commerce Clause." *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992).

Section 201(b)(1) of the FPA provides, *inter alia*, that FERC "shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). In examining the particular part of Section 201(b)(1) that references states' existing lawful authority over hydroelectric energy, the Supreme Court concluded that "§ 201(b) simply saves from pre-emption under Part II of the Federal Power Act such state authority as was otherwise 'lawful'" and that "[n]othing in the legislative history or language of the statute evinces a congressional intent 'to alter the limits of state power otherwise imposed by the Commerce Clause.'" *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (citation omitted). As later recognized by the Supreme Court: "Our decisions have uniformly subjected Commerce Clause cases implicating the Federal Power Act to scrutiny on the merits." *Wyoming*, 502 U.S. at 458.

The Court finds Defendants have failed to demonstrate a clear and unambiguous intent on behalf of Congress to permit states to discriminate against interstate commerce in connection with the siting of generation facilities within a state.

3. Proof of Discrimination

The Court has found that the PSC's actions challenged by Plaintiffs do not fall within an established or recognized "exception" to the dormant Commerce Clause. As a result, "the Commerce Clause stands as constitutional limitation on the means by which [the PSC] can constitutionally seek to achieve [its] goal" of incentivizing the development and

operation of a private local generation facility. *See Bacchus Imports*, 468 U.S. at 271.

Plaintiffs bear the burden to demonstrate that the Generation Order "'discriminates [against interstate commerce] facially, in its practical effect, or in its purpose.'" *Yamaha Motor Corp.*, 401 F.3d at 567 (alteration in original) (citation omitted). If Plaintiffs make such a showing, then the Generation Order will be struck down unless Defendants demonstrate "both that the statute 'serves a legitimate local purpose [unrelated to economic protectionism],' and that this purpose could not be served well by available nondiscriminatory means." *Maine*, 477 U.S. at 138 (citation omitted). However, if Plaintiffs demonstrate that the Generation Order "amounts to simple economic protectionism, a 'virtually *per se* rule of invalidity' has [been] applied" by the Supreme Court. *See Wyoming*, 502 U.S. at 454-55 (1992) (citation omitted).

a. "SWMAAC" Locational Requirement Does Not Preclude a Finding of Affirmative Discrimination

The fact that the locational requirement is defined as "SWMAAC," which includes the District of Columbia and only part of Maryland, does not "insulate" the Generation Order from Plaintiffs' contention that by virtue of the locational restriction in the RFP, the PSC affirmatively discriminated against interstate commerce. *See C & A Carbone*, 511 U.S. at 391 ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."); *Dean Milk*, 340 U.S. at 354 n.4 ("It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce."). Nor does the

fact that SWMAAC includes the District of Columbia make any discrimination by the PSC no longer discriminatory. *See New Energy*, 486 U.S. at 274 (explaining that making a tax credit available to some out-of-state manufacturers does not make the credit not discriminatory); *Alliance for Clean Coal v. Bayh*, 72 F.3d 556, 560 (7th Cir. 1995) ("Protection of local, or even regional, industry is simply not a legislative action that is consistent with the Commerce Clause.").

The Court finds that there was little, if any, realistic possibility that the generation facility in question would be located in the District of Columbia. Mr. Massey testified that about 98% of SWMAAC geographically is within Maryland. Tr. Mar. 6 (AM) at 37:16-18 (Massey). In addition, evidence as to the availability of useable sites in the District of Columbia, established a high degree of improbability—if not impossibility—that an acceptable facility could be located there. Moreover, the RFP required any proposal to include a "[d]escription of the reliability and direct economic *benefits to Maryland ratepayers* as a result of the Generation Capacity Resource" and provided that in scoring bids, 2.5% of the non-price score consisted of the "*benefits to the State of Maryland*." P.2 (2011 RFP) RFP at 10, 14-15 (emphasis added). In any event, even if the facility realistically could have been located in the District of Columbia rather than Maryland, this fact would have no bearing on the affirmative discrimination claim.

The Court finds that the PSC's regulatory action would be repugnant to the dormant Commerce Clause if it discriminates against economic interests outside a particular zone of the PJM region.

b. Differential Treatment of In-State and Out-of-State Economic Interests

Plaintiffs assert that the evidence establishes that the Generation Order discriminates against interstate commerce on its face and in its practical effect. Plaintiffs contend that the SWMAAC locational requirement treats in-state and out-of-state economic interests differently, "the former benefitting from exclusive rights to participate in the RFP and the latter precluded from participation."[71] Pls.' Post-Trial Br. [Document 144] at 63. Defendants contend that Plaintiffs have failed to prove affirmative discrimination against interstate commerce.

The dormant Commerce Clause "prevents a State from 'jeopardizing the welfare of the Nation as a whole' by 'plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.'" *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (alteration in original) (citation omitted). Precluding this type of state action enforces the principle that "[t]he mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States." *Granholm v. Heald*, 544 U.S. 460, 472 (2005). As the Supreme Court explained in 1949:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by

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[71] A representative of PPL testified that PPL reviewed the PSC's RFP but did not participate because PPL "did not have generation asset facility [sic] that was in SWMAAC and available to participate based on that requirement" and the "RFP acted in a manner inconsistent with [PPL's] market principles." Tr. Mar. 4 (AM) at 71:9-24 (Alessandrini).

> the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. *Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

Discrimination for purposes of the dormant Commerce Clause "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys.*, 511 U.S. at 99-100 (holding that a greater surcharge on disposal of in-state waste than on disposal of out-of-state waste facially discriminated against interstate commerce). For instance, states may not "provid[e] a direct commercial advantage to local business." *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). "Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (citation omitted). The Supreme Court has considered states to have impermissibly favored in-state economic interests over out-of-state economic interests by: (1) providing only tax credits for in-state sales of products actually produced in-state, *New Energy*, 486 U.S. at 271;

(2) precluding out-of-state producers from shipping products directly to in-state consumers, *Granholm*, 544 U.S. at 473-74; and (3) giving property tax exemptions to in-state entities that primarily serve state residents but not to in-state entities that principally serve interstate clientele, *Camps Newfound/Owatonna*, 520 U.S. at 576-77.

The Court finds that Plaintiffs have failed to prove that the SWMAAC locational requirement is facially discriminatory for purposes of the dormant Commerce Clause.[72] The mere fact that the PSC sought to procure a new generation facility located within SWMAAC does not, standing alone, discriminate *against* the flow of interstate commerce. The Generation Order does not erect any barriers to the sale or transmission of electric energy at wholesale in and out of SWMAAC and within the PJM region or to providing a competitive advantage to an in-SWMAAC generation facility selling electric energy at wholesale at the expense of other generation facilities competing in the same market. CPV's facility would compete in the PJM Markets with all other resources to sell its energy and capacity to PJM. The Maryland EDCs directed to enter into the CfD would likewise continue to purchase energy and capacity from the wholesale energy markets, including from PJM in the PJM Markets. *Cf. Wyoming*, 502 U.S. at 455-56 (finding that a law that required all in-state coal-fired power plants to burn a mixture of coal containing 10% coal mined in the state

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[72] Plaintiff's dormant Commerce Clause claim is limited to the SWMAAC locational requirement. Hence, there is no contention that the Generation Order sans the SWMAAC locational requirement discriminated against interstate commerce by orchestrating long-term financing for a preferred market participant.

discriminated on its face and in practical effect against interstate commerce because such a requirement explicitly operated to the exclusion of coal mined in other states); *Dean Milk*, 340 U.S. at 350, 353 (holding that a city ordinance that "ma[de] it unlawful to sell any milk as pasteurized unless it has been processed and bottled at an approved pasteurization plant within a radius of five miles" from the city of Madison violated the dormant Commerce Clause).

Though the PSC has exercised its regulatory power to create and sustain another competitor in the wholesale energy market through indirect subsidization, the fact that the PSC limited its financial backing to a yet-to-built facility in SWMAAC does not equate to affirmative discrimination against interstate commerce or out-of-state economic interests within the meaning of the dormant Commerce Clause. *See generally McBurney*, 667 F.3d at 469 (explaining that the dormant Commerce Clause "'*does not purport to . . . protect the participants in intrastate or interstate markets, nor the participants' chosen way of doing business*'" (alteration in original) (citation omitted)).

Relying on *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995), Plaintiffs assert the SWMAAC "locational requirement discriminates against out-of-state commerce [because] it effectively displaces imported power with locally produced power." Pls.' Post-Trial Br. [Document 144] at 64. However, the Seventh Circuit's decision in *Alliance for Clean Coal* does not stand for the broad proposition that displacing imported energy discriminates against interstate commerce. In *Alliance for Clean Coal*, Illinois passed a law that, while not compelling all in-state coal burning generators to burn high-sulfur coal mined in Illinois, implemented several statutory

mechanisms[73] that significantly hindered, if not totally prevented, Illinois utilities from switching to low-sulfur out-of-state coal to meet environmental mandates. 44 F.3d at 594¬96. Through these statutory mechanisms, the Seventh Circuit held that Illinois discriminated against interstate commerce by making out-of-state coal a less viable option for in-state generators to meet environmental mandates. *See id.* at 596. *Alliance for Clean Coal* is less than comparable to the instant case because the PSC did not act for the explicit purpose of protecting some in-state business, like coal mining, in the wake of new federal regulation threatening to wipe out that local business. *See id.* at 594-96 (explaining that federal amendments to the Clean Air Act "meant the end of the salad days for high-sulfur coal-producing states such as Illinois"). Moreover, the PSC has in no way regulated to make energy generated outside SWMAAC a less viable and/or less competitive option for distribution in Maryland.

Furthermore, the evidence does not support the claim that the Generation Order will discriminatorily displace imported power. The Generation Order will add additional supply to the wholesale energy marketplace, but whether or not any power is

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[73] For instance, the Illinois law: (1) required the state regulatory entity to take into account the local coal industry when considering plans to comply with sulfur-related environmental mandates; (2) mandated that certain generating units install scrubbers so that those units could burn the high-sulfur Illinois coal; (3) guaranteed the cost of the scrubbers would be passed through to consumers; and (4) required a utility to get regulatory approval before changing its fuel source in a way that would result in a 10% or greater decrease in the use of Illinois coal. *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 595-96 (7th Cir. 1995).

displaced will depend upon demand and all the factors that play into the market-based auction process administered by PJM. If demand for electric energy increases in proportion to the capacity of a new facility, then the facility's effect is neutral. Also, the generator called for in the Generation Order would sell to PJM in the PJM Markets so that any displacement of power will be the result of PJM's dispatch and procurement models. *See* Tr. Mar. 6 (AM) at 18:1-19:18, 22:5-10, (Massey). Even absent the SWMAAC locational requirement, the procurement of a new generation facility would have the same displacement effects complained of by Plaintiffs because that facility would still increase the available supply of electric energy and capacity.

The Court does not find persuasive Plaintiffs' position that the SWMAAC locational restriction discriminates against interstate commerce because it requires economic activity to take place in-state to the exclusion of out-of-state sources of the same activity. As discussed *supra*, the Generation Order does not impose any hindrance on the ability of market participants to buy and sell wholesale energy and related products in the PJM region. Therefore, the existence of a facility in Maryland does not operate to the exclusion of generation facilities outside of SWMAAC, which are still free to supply electric energy to Maryland EDCs through the PJM Markets or bilateral transactions. The decisions relied upon by Plaintiffs in support of their position are inapposite. For instance, in *Tri-M Grp., LLC v. Sharp*, the Third Circuit struck down a residency requirement as facially discriminatory under the dormant Commerce Clause because the regulatory scheme required a contractor to set up and maintain a permanent office location in the state to be eligible to pay lower

apprentice wage rates for work done on in-state public projects. 638 F.3d 406, 412, 413 (3d Cir. 2011). The Third Circuit explained this type of in-state presence requirement "forces out-of-state contractors . . . to 'surrender whatever competitive advantages they may possess' by burdening them with expenditures for a new local operation, or with the payment of increased wages on their contracts." *See id.* at 427-28. Here, the Generation Order does not require any out-of-state competitor to establish a physical presence in SWMAAC or Maryland to supply electric energy to Maryland residents.[74]

Accordingly, the Court finds that the Plaintiffs have failed to demonstrate that the Generation Order discriminates against interstate commerce either facially, in its practical effect, or in its purpose as a consequence of the SWMAAC locational requirement in the RFP.

4. Burden on Interstate Commerce

Plaintiffs contend that the Generation Order imposes a significant burden on interstate commerce and that there is no evidence in the record demonstrating that the Order was needed to maintain reliability in Maryland. Defendants maintain that Plaintiffs have failed to meet their burden of

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[74] The Generation Order also cannot be construed as an in-state processing requirement of the kind considered to discriminate against interstate commerce because it imposes no requirement that Maryland EDCs purchase electric energy and/or capacity from a generator located within SWMAAC. *Cf. C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 386-87, 394 (1994) (finding that a local regulation had the practical effect of discriminating against interstate commerce where it only allowed a preferred local facility to provide commercial service of processing waste within the town limits).

demonstrating that the benefits of the Generation Order are clearly outweighed by the burdens it imposes on interstate commerce.

State action that does not affirmatively discriminate against interstate commerce may nonetheless violate the dormant Commerce Clause if it places an undue burden on interstate commerce. *See Yamaha Motor Corp.*, 401 F.3d at 567. The Supreme Court has noted:

> [I]t must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.'"

Huron Portland Cement Co. v. City of Detroit, Mich., 362 U.S. 440, 443-44 (1960) (alteration in original).

To determine whether state action burdens interstate commerce in violation of the dormant Commerce Clause, courts apply the *Pike* undue burden balancing test:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it

> could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (internal citation omitted). The undue burden test is less scrutinizing than the test for affirmatively discriminatory state actions. *See Yamaha Motor Corp.*, 401 F.3d at 567.

As discussed herein, Maryland has a legitimate interest in ensuring that Maryland residents have available to them an adequate and reliable supply of electric energy. Presumably,[75] Plaintiffs take the position that the SWMAAC locational requirement constitutes an undue burden on interstate commerce. The PSC regulated to finance indirectly the development and operation of a generation facility within SWMAAC, which will participate in the wholesale energy and capacity markets in the PJM region like any other generation facility. Other than increasing the available supply of electric energy and capacity in the PJM region by adding a new generation facility in SWMAAC, the Generation Order does not affect the ability of other market participants to sell energy and capacity in the PJM Markets. The Court does not find evidence that the addition of a state-sponsored market participant physically located within SWMAAC imposes a burden, let alone an undue burden, on interstate commerce.

Even if the Generation Order could be viewed as placing or imposing some burden on interstate commerce, the burden would be *de minimis*, and thus, not clearly excessive in relation to the benefits to Maryland. The soundness of the PSC's reasoning in choosing to limit the RFP to generators physically

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[75] Plaintiffs' position is not perfectly clear on this point.

located within SWMAAC can, like the rationale for most regulatory actions, be the subject of reasonable debate. However, the rationale reflected in the Generation Order and related materials is not so irrational as to be outweighed by an incidental burden on interstate commerce.

Accordingly, the Court finds that Plaintiffs have failed to demonstrate that the Generation Order, as a consequence of the SWMAAC locational requirement in the RFP, imposes an undue burden on interstate commerce that is clearly excessive in relation to the putative local benefits.

C. Violation of 42 U.S.C. § 1983 (Count III)

In Count III, Plaintiffs claim that the PSC deprived them of their federal statutory rights protected by 42 U.S.C. § 1983. To the extent that Plaintiffs have not abandoned that claim, the Court finds it meritless because the Fourth Circuit has "held that the Supremacy Clause is not a source of substantive individual rights that could support an action brought pursuant to Section 1983." *Md. Pest Control Ass'n v. Montgomery Cnty., Md.*, 884 F.2d 160, 162-63 (4th Cir. 1989) (per curiam).

IV. CONCLUSION

For the reasons set forth herein, the Court decides that:

1. The Generation Order is violative of the Supremacy Clause of the United States Constitution.
2. The Generation Order is not violative of the dormant Commerce Clause of the United States Constitution.
3. Plaintiffs have not presented a viable claim under 28 U.S.C. § 1983.

SO DECIDED, this Monday, September 30, 2013.

/s/
Marvin J. Garbis
United States District Judge

APPENDIX

TERM/ACRONYM	DEFINITION
PSC	Maryland Public Service Commission
Order/Generation Order	Order No. 84815 issued by the PSC on April 12, 2012
EDCs	Electric Distribution Companies
CfD	Contract for Differences
FPA	Federal Power Act
FERC	Federal Energy Regulatory Commission
RTO	Regional Transmission Organization
PJM region	13 states and the District of Columbia
PJM	PJM Interconnection, LLC
LSE	Load Serving Entity, an entity that has state or local authority to sell electric energy to end-use customers located within the PJM region
RAA	Reliability Assurance Agreement
BRA	Base Residual Auction
RPM	Reliability Price Model
RTEP	Regional Transmission Expansion Plan

FRR	Fixed Resource Requirement Alternative
Uprate	Action taken by an existing generation facility to expand its generation capacity
TrAIL	Trans-Allegheny Interstate Line, a transmission line constructed and placed into service by PJM
EQR	Electronic Quarterly Report, pursuant to a FERC requirement, entities that have market-based rate tariffs are required to file on a quarterly basis a report of all the transactions and contracts entered into that are subject to the jurisdiction of FERC. Tr. Mar. 7 (AM) at 114:16-115:8 (Knight)
MOPR	Minimum Offer Price Rule
PJM Tariff	The Open Access Transmission Tariff pursuant to which PJM operates

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Filed October 24, 2013]

Civil Action No. MJG-12-1286

PPL ENERGYPLUS, LLC, *et al.*,
Plaintiffs,

vs.

DOUGLAS R. M. NAZARIAN, in his official capacity as Chairman of the Maryland Public Service Commission, *et al.*
Defendants.

JUDGMENT ORDER

In accordance with the Memorandum of Decision [Document 177], the Court issues this Judgment Order:

1. Complaint Count I (Supremacy Clause):

   a. Plaintiffs have prevailed and pursuant to 28 U.S.C. § 2201, the Court declares that the Maryland Public Service Commission's ("PSC's") Order No. 84815 entered in PSC Case No. 9214 (In the Matter of Whether New Generating Facilities are Needed to Meet Long-Term Demand for Standard Offer Service) ("Generation Order") is violative of the Supremacy Clause of the United States Constitution, art. VI, cl.2.

b. The Fixed/Indexed Pricing Contracts for Differences ("Contracts for Differences") entered into between CPV Maryland, LLC, and each of the Maryland electric distribution companies—Baltimore Gas and Electric Company, Potomac Electric Power Company, and Delmarva Power & Light Company (collectively, "Maryland EDCs")—entered into pursuant to the PSC Generation Order, are illegal and unenforceable.

c. The Maryland PSC has committed that, absent further direction from this Court or an appellate court having jurisdiction over the case, it shall not direct the Maryland EDCs to make payments to or to receive payments from CPV Maryland under the Contracts for Differences.[1]

d. This Judgment, while determining that the Contracts for Differences entered into pursuant to the Generation Order are illegal, does not address any question regarding the validity of the PSC's findings included in the Generation Order and referenced in the Court's Memorandum of Decision.

2. Complaint Count II (Dormant Commerce Clause): All claims in Complaint Count II are dismissed with prejudice.

3. Complaint Count III (42 U.S.C. § 1983): All claims in Complaint Count III are dismissed with prejudice.

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[1] The Court retains jurisdiction to consider injunctive relief, if needed, to insure compliance with this commitment.

4. Plaintiffs shall recover their assessable costs.

5. This Order shall be deemed to be a final Judgment within the meaning of Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED, this Thursday, October 24, 2013.

/s/
Marvin J. Garbis
United States District Judge

APPENDIX F

Supremacy Clause

U.S. Const. Art. VI, Cl 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX G

Federal Power Act, Section 201

16 USCS § 824

§ 824. Declaration of policy; application of Part

(a) Federal regulation of transmission and sale of electric energy. It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part [*16 USCS §§ 824* et seq.] and the Part next following [*16 USCS §§ 825* et seq.] and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce.

(1) The provisions of this Part [*16 USCS §§ 824* et seq.] shall apply to the transmis-sion of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part [*16 USCS §§ 824* et seq.] and the Part next following

[*16 USCS §§ 825* et seq.], over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding section 201(f) [subsec. (f) of this section], the provisions of sec-tions 203(a)(2), 206(e), 210, 211, 211A, 212, 215, 216, 217, 218, 219, 220, 221, and 222 [*16 USCS §§ 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u*, and *824v*] shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this Act [*16 USCS §§ 791a* et seq.] with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 203(a)(2), 206(e), 210, 211, 211A, 212, 215, 216, 217, 218, 219, 220, 221, or 222 [*16 USCS § 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u*, or *824v*], shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce. For the purpose of this Part [*16 USCS §§ 824* et seq.], electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale". The term "sale of electric energy at wholesale" when used in this

Part [*16 USCS §§ 824* et seq.] means a sale of electric energy to any person for resale.

(e) "Public utility" defined. The term "public utility" when used in this Part [*16 USCS §§ 824* et seq.] or in the Part next following [*16 USCS §§ 825* et seq.] means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part [*16 USCS §§ 824* et seq.] (other than facilities subject to such jurisdiction solely by reason of section 206(e), 206(f), 210, 211, 211A, 212, 215, 216, 217, 218, 219, 220, 221, or 222 [*16 USCS § 824e(e), 824e(f), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u*, or *824v*]).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt. No provision in this Part [*16 USCS §§ 824* et seq.] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (*7 U.S.C. 901* et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records.

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005.

Federal Power Act, Section 205

16 USCS § 824d

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates. All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful. No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules. Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes. Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five month period. Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the

Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause".

(1) Not later than 2 years after the date of the enactment of this subsection [Nov. 9, 1978] and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate

schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

Federal Power Act, Section 206

16 USCS § 824e

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues. Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest. Whenever the Commission institutes a proceeding under this section, the Commission

shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 205 of this Act [*16 USCS § 824d*] and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the rea-sons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of

the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company". Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

(d) Investigation of costs. The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales.

(1) In this subsection:

(A) The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 201(f) [*16 USCS § 824(f)*] voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4) (A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

Supreme Court, U.S.
FILED
FEB 24 2015
OFFICE OF THE CLERK

No. 14-623

IN THE

Supreme Court of the United States

CPV MARYLAND, LLC,

Petitioner,

v.

PPL ENERGYPLUS, LLC, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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February 24, 2015

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PETITIONER'S REPLY

If allowed to stand, the Fourth Circuit's rulings would strip States of powers and responsibilities that Congress carefully reserved to them in the Federal Power Act ("FPA"). Those rulings fundamentally misunderstand the FPA's allocation of authority, and of the importance of the States' power to direct utilities to enter into long-term contracts to purchase power and support investment in new power plants.

On field preemption, the Fourth Circuit held that by requiring a utility to enter into a contract reflecting the price obtained through a competitive procurement, a State improperly "sets" or "guarantees" a rate. But States frequently direct procurements for local utilities, requiring them to enter into contracts at the price offered by the successful bidder. Until the decision below, the line between state and federal authority was brightly lit and well-described in FERC's own preemption cases. So long as the State did not dictate the price, allowing it to be set by bidders, there was no field preemption. That distinction is summarily swept away by the Fourth Circuit's ruling and in Respondents' Opposition.

The Fourth Circuit's and Respondents' conflict preemption theories are equally indefensible. Respondents identify nothing in the FPA, from FERC or in this Court's cases, suggesting that prices, or rules, applicable to transactions in PJM's auction, are intended to limit *any* transactions outside the auction.

When coupled with the Third Circuit decision in the parallel New Jersey case, the effect of these

decisions is to severely limit the States' ability to support needed power plant construction. That limitation is flatly inconsistent with Congress' decision to leave responsibility for new electricity generation in the States' hands. And it dangerously creates a significant void in the ability to support new generation because FERC itself has no authority to direct new construction.

In their Opposition, Respondents do not dispute the frequency or importance of state-mandated procurements for long-term contracts supporting investment in electricity infrastructure, nor the effect of the decision below to severely restrict those procurements. Respondents are not concerned about the effect of these decisions on the States' ability to provide for new generation because they are, largely, owners of incumbent power plants, content to restrict new entry.

Instead, Respondents' principal argument against review rests on a repeated assertion that these rulings are mere "fact[] finding." Not so. The Fourth Circuit plainly stated legal conclusions. And those conclusions are inconsistent with settled principles, precedents, and long-standing practices used by States to support development of the Nation's electricity infrastructure.

The decision below is wrong, dramatic in its impact, and requires this Court's review.

I. Respondents' Opposition Reinforces the Circuit Court Errors

A. In State-Directed Competitive Procurements, States Do Not "Set" Rates

No one disputes that "States may *not* ... *set* the price ... at which electricity or capacity is sold at wholesale." Opp.-16 (emphasis in original). Maryland did not do so here.

The prices in the contracts for differences ("CfDs") were not "set" by Maryland. They were offered by CPV, a bidder in an open competition. Pet.-24, 27-29. States have overseen procurements by regulated utilities for decades, with FERC's blessing and encouragement. And the distinction between States dictating a particular price, on the one hand, and supervising a procurement that produces a competitive price, on the other, is not new. The former is preempted; the latter is not.

State-supervised procurements that result in long-term contracts with a State's utilities are ubiquitous, and, until the decisions below, uncontroversial.[1] See Susan Tierney and Todd Schatzki, National Association of Regulatory Utility

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[1] Respondents propose to distinguish state-directed contracts from contracts "freely negotiated ... with purchasers." Opp.-25 (citing *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 531, 537 (2008)). But "freely negotiated" is not a preemption standard. It indicates that the contract should be granted a presumption of validity because it is disciplined by market forces. See *id.* Cases like *Allegheny*, *infra*, illustrate that competitive procurements equally supply market discipline.

Commissioners, *Competitive Procurement of Retail Electricity Supply* 1 (2008) (surveying the use of such competitive procurement processes). States have used such procurements for various purposes, including to ensure electricity supplies at a stable price over the long-term. *Id.* at 51 (identifying States that had recently ordered utilities to enter into long-term power purchasing contracts).

To support fuel-source diversity and innovation, 29 States direct utilities to procure a percentage of their power from renewable energy sources. Claire E. Kreycik, et al., *Procurement Options for New Renewable Electricity Supply* 1 (2011); see *CGE Fulton, L.L.C.*, 70 FERC ¶61,290, 62,080 (1995) ("states have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction ... [and] may order utilities to purchase renewable generation"). States also direct their utilities to enter into contracts to ensure that failing natural gas or nuclear plants need not shut down. Pet-33. And many States direct utilities to competitively procure standard offer service.[2] Tierney, *supra*, at 1; see *Allegheny Energy Supply Company, LLC*, 115 FERC, ¶61,221, PP 5, 18, 19 (2006) (FERC approves standard offer service procured through a competitive process mandated and supervised by state regulator).

States have longstanding authority to "establish ... [c]ompetitive procedures for the acquisition of electric energy ... purchased at wholesale." 18

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[2] See *generally* American Public Power Association, *Power Supply Procurement in Retail Choice States* (2007).

C.F.R. §35.27. And FERC routinely approves contracts resulting from procurements to buy power over a fixed term. E.g., *Doswell Ltd. P'ship*, 50 FERC ¶61,251, 61,756-57 (1990) (approving contract with prices set by competition); *Allegheny*, *supra*, at PP 4-5 (state-supervised procurement where "winning bidders were selected solely on the basis of price").

As FERC has long held, such procurements are preempted only to the extent the State *dictates* the price, rather than allows it to be determined by competition. Pet.-11, 28; *Midwest Power Sys., Inc.*, 78 FERC ¶61,067, 61,248 (1997) ("preempted to ... the extent [the State] set[s] rates for the wholesale sales of electric energy"); *Cal. Pub. Utils. Comm'n*, 132 FERC ¶61,047, P 69 (2010) ("preempted to the extent that the [State] is setting wholesale rates").

States have long conformed their exercise of authority over their utilities' purchasing decisions to the preemption principles described by FERC. Those principles are well-founded. State-directed purchasing decisions—reflecting judgments about quantities of capacity to be obtained, over what period, generated with what fuel—reflect core state prerogatives under the FPA. FERC's concern is with wholesale transactions and, most particularly, price. So long as the State doesn't itself calculate and impose the price it thinks proper—instead leaving that to market forces—it is not invading FERC territory.

Respondents literally ignore this longstanding principle, and suggest no way that it could survive the lower courts' rulings.

Instead, Respondents try to avoid review primarily by characterizing the lower courts' holdings as "fact[] finding," unworthy of this Court's attention. Opp.-1, 16, 24, 27, 28, 31. But that characterization is transparently wrong. There are no facts in dispute with respect to field preemption (or, as shown below, conflict preemption). The question whether a price produced by a state-directed procurement is "set" by the State is a question of law, squarely presented on this record, by the Petition, and in the opinion below. And it is of unquestionable importance because it goes directly to whether States are allowed to fulfill their responsibility to ensure reliable electricity supplies by means of competitive procurements.[3]

B. The PJM Auction Does Not Set Prices Or Rules For Transactions Outside The Auction: There Is No Basis For Conflict Preemption

Implying that Maryland defied FERC policy, Respondents argue that these contracts ensure that "'generators receive a different price for capacity they clear through PJM than what FERC intended.'" And "to make matters worse," this price extends for 20 years, though FERC rejected pleas to "expand NEPA's three-year fixed revenue guarantee." Opp.-

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[3] In passing, Respondents suggest that the State "set" the price because it retained authority to cancel the procurement. Opp.-24. But one can scarcely imagine *any* procurement being conducted without reserving the power to reject all bids and cancel the procurement. And the existence of such a residual power (not exercised here) would not, in any event, convert competition into impermissible rate-setting.

17. On this basis, Respondents suggest, as did the Fourth Circuit, that conflict preemption can be found because Maryland "set" rates different from auction rates and because Maryland's outside-the-auction contracts are on different terms than transactions within the auction.

But there is no support for the premise of either theory. PJM auction rules, and auction prices, do not apply to transactions outside the auction. That transactions outside the auction take place on different terms than transactions in the auction is commonplace and creates no conflict with federal law.

To the contrary, as demonstrated in the Petition, see Pet.-30, the PJM auction was never intended to set the price of any transaction other than the transaction being solicited in the auction itself, an auction sale. Outside-the-auction transactions take place every day. The auction price represents a single-year sale of fungible capacity. Outside-the-auction contracts, including transactions involving capacity sold through the auction, are invariably at different prices, largely because, like the CfDs here, they are for different products, such as long-term price commitments, or electricity produced by specified fuels or technologies. See *Morgan Stanley*, 554 U.S. at 547

Nor does the "NEPA" rule or any other auction rule prescribe the terms of transactions taking place outside the auction. When States and developers asked FERC to extend the "NEPA" period in order to attain longer term rate stability *within the auction* itself, FERC declined. But FERC's refusal to change internal auction rules—which would impose costs on

purchasers in the auction—says nothing about whether a State can take actions *outside the auction*, under its own authority, such as requiring its utilities to procure capacity under long-term contracts. Pet.-30.

Respondents observe that while the CfD contracts are bilateral contracts, they are not contracts for an actual capacity purchase between a buyer and seller. Rather, they require the utilities to make supplemental payments, net of revenues earned by the generator selling its capacity into the PJM auction, and are measured against the yearly PJM capacity clearing price. Opp.-26.

Those supplemental payments, which operate as a hedge, are in consideration for several things important to the State, not merely a commitment to supply capacity to the market. They reflect a commitment to construct a new power plant of a designated capacity, at a designated locale, using a preferred technology, *and* (as required by FERC rules) to sell the capacity produced by the plant into the PJM auction over many years. Cf. Opp.-26-27. And because the contracts operate over the long term they afford generators, utilities and ratepayers long-term price stability that the auction does not.

In any event, Respondents do not explain why there should be a constitutional difference between a competitively-procured, long-term hedging-type contract, on the one hand, and a long-term competitively-produced power purchase agreement,

on the other. [4] Neither is field preempted because in neither format does the State "set" the price. As to conflict preemption, PJM's auction prices do not determine prices for any transactions taking place outside the auction. Moreover, whether the mechanism used is a hedge-style contract or a power purchase agreement, the economics of the transactions are identical. Pet.-27. In both instances, utilities, and ultimately ratepayers, pay the difference between the contract price and the auction clearing price, and PJM pays the generator only the clearing price. See Pet.-15-16.

The Fourth Circuit's logical leap—transforming auction rules and prices into edicts applicable outside the auction—opens the door to an array of challenges to state programs based on auction rules. That logical leap obviated the Fourth Circuit's need to identify any substantive conflict or frustration of federal law, and reflects the kind of "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" that is anathema to

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[4] Indeed, since the CfDs are not contracts to purchase capacity (*i.e.*, the only product solicited in the auction), it is difficult to suggest that they contain rates for such purchases. And if they do not govern rates for a wholesale sale subject to FERC jurisdiction, that would be a second reason for rejecting Respondents' field preemption claim. Respondents argue that FERC can potentially "regulate" the CfDs under FPA §205 because they contain a rate "'in connection with' [ ] wholesale transactions." Opp.-15-16. Perhaps. But proving that FERC might assert jurisdiction over the CfDs does not mean preemption (unless, of course, the State "set" the rate). That a contract is subject to FERC jurisdiction means it is reviewable by FERC, not that it is preempted under the Supremacy Clause.

this Court's conflict preemption jurisprudence. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

C. Maryland Has Not Surrendered Its FPA Authority

Respondents endorse the Fourth Circuit's suggestion that States that restructured vertically-integrated utilities to foster wholesale or retail competition somehow "relinquish[ed]" authority to require purchases by their regulated utilities. Pet.App.12a; Opp.-6.

Maryland relinquished no authority, and Respondents identify no law or mechanism to the contrary. By encouraging generators and utilities to participate in competitive markets, States necessarily agreed that they must abide by FERC-established rules for those markets. But compliance with market rules does not impose restrictions on state power *outside* those markets.

Nor did Congress or FERC contemplate relinquishment. To the contrary, Congress (and FERC) intended States to *retain* authority over utility buy-side decisions and power generation portfolios. See *New York v. FERC*, 535 U.S. 1, 24 (2002). And FERC itself rejected Respondents' relinquishment theory, assuring States (and the courts) that forward capacity auctions would not divest States of authority to support new generation, particularly through long-term contracts. See *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 480-81 (D.C. Cir. 2009); *PJM Interconnection, L.L.C.*, 107 FERC ¶61,112, P 20 (2004) (volatility of short-term auction markets offers "an inadequate

foundation for cost-effective financing of new infrastructure," better supported by long-term contracts).

Respondents argue that States could reclaim their historic authority by building their own power plants, or recreating the system of vertically-integrated utilities, leaving unstated how this could be accomplished. More importantly, Respondents leave unexplained why States cannot *both* encourage participation in competitive markets *and* support new construction when needed.

D. There Is No Trapped Cost Here

Respondents relegate *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) to a footnote. For good reason. *Mississippi* involved a State's refusal to allow a utility to recover the cost of a power purchase that FERC had approved, trapping that cost. But there is no trapped cost here; the State has guaranteed that the utilities will recover CfD-related costs from their ratepayers. It does not "stand to reason" that because a State may not bar utilities from recovering revenue needed to cover a FERC-approved rate, a State is likewise barred from authorizing payments beyond those costs in order to secure long-term pricing commitments from power generators. Cf. Opp.-24 n.3. Additional payments do not "erode" any federal policy. Cf. Pet.App.19a.

E. FERC's Amicus Brief Deserves No Weight

Respondents tout FERC's Third Circuit amicus brief supporting preemption. But, as Respondents acknowledge, FERC did *not* embrace their theory that these contracts involve state rate-setting.

Instead, FERC took the inexplicable position that all state actions affecting auction rates are preempted. That theory was rejected by the Third Circuit as overbroad and inconsistent with this Court's precedents. Pet. No. 14-634-29a. And it was also inconsistent with FERC's specific ruling that state-sponsored generation, including CPV's power plant, should be allowed to participate in the auction, notwithstanding any "subsidy." *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 92 (3d Cir. 2014). Further, FERC disclaimed any intention to interfere with state authority to support new generation through these mechanisms. *PJM Interconnection, L.L.C.*, 135 FERC ¶61,022, P 142 (2011) ("[auction rules changes were not intended to] encroach on a state's ability to act within its borders to ensure resource adequacy or to favor particular types of new generation .... we reiterate that states are free to promote all of those policies"); Pet.-22. It is *not* FERC's opportunistic *amicus* assertions, but rather FERC's regulatory rulings, that count.

II. The Questions Are Vitally Important

An unprecedented and dangerous shift in the allocation of state-federal authority to support power plant construction flows from the Fourth and Third Circuit decisions, which fundamentally misunderstand the underlying regulatory framework. But any such shift may only be announced by Congress, or by this Court, based upon its analysis of Congress' intentions, and of FERC's programs.

Amici highlight the importance of the questions presented. They include the National Association of Regulatory Utility Commissioners, representing all

state and territorial utility commissions; the National Association of State Utility Consumer Advocates, representing all retail ratepayers; the American Public Power Association and the National Rural Electric Cooperative Association, representing the Nation's publicly owned and member-owned electric utilities; and other States, public utility commissions, and similarly-interested governmental authorities.

As amici explain, the Fourth and Third Circuit decisions deprive States of basic tools required to ensure reliable and diverse electricity supplies. Those decisions require this Court's attention now. Planning for major energy infrastructure projects takes many years, and must be structured against a background of reliable legal principles. If the decisions below are allowed to stand, they will do more than severely limit States' options within the wide region covered by these two Circuits. They will also send the message more broadly that state support for energy development projects may end up illusory, vulnerable to preemption challenges by incumbent generators seeking to limit competition from more efficient generators and price decreases resulting from increases in overall electricity supply. And that, in turn, undermines the ability of investors to rely on state-promised ratepayer revenue commitments needed to support major energy infrastructure projects. This Court should grant certiorari and reverse.

CONCLUSION

The Petition should be granted.

Respectfully submitted.

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February 24, 2015

Supreme Court, U.S.
FILED
SEP 29 2015
OFFICE OF THE CLERK

No. 14-623

IN THE

Supreme Court of the United States

CPV MARYLAND, LLC,

Petitioner,

v.

PPL ENERGYPLUS, LLC, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONERS[1]

A. *Amicus* United States cannot reconcile the rulings below with the field preemption principles applicable under the Federal Power Act ("FPA") as set forth in the Court's decision in *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015). In *Oneok*, this Court explained that "field preemption" poses no obstacle to the States' ability to target objectives and pursue responsibilities that Congress assigned to them. That state actions impact FERC-supervised interstate markets – as they invariably do when new capacity is added in the market – does not "field preempt" those actions. *Oneok*, 135 S. Ct. at 1600. State actions are field preempted only if they "aim" at the federal field, rather than at targets within the States' domain.

By subsidizing new power plant construction with long-term contracts and payments by ratepayers through the States' retail public utilities, Maryland and New Jersey "aimed" at matters squarely within their expressly-assigned FPA authority. The States' programs here (1) support new power plant construction (assigned to the States), by (2) directing state-regulated local utilities to make contractual payments (also assigned to the States), (3) supported, in turn, by retail rates (also a matter for the States). Even though the States' initiatives *affect* interstate markets and prices, they

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[1] Because the Petitions in Nos. 14-614 & 14-623 and 14-634 & 14-694 address cases from two circuits, the Clerk asked Petitioners to file two separately-captioned briefs.

are *aimed* at matters on the States' side of the FPA dividing line.

B. The government itself properly rejects the Third and Fourth Circuits' preemption holdings, namely, that state-supervised procurements that result in contracts providing payments different from prices for sales in the auction thereby "set rates." Absent review by this Court, those holdings will stand as circuit precedent, reflecting a basic misunderstanding about what it means for a government body to "set" a rate. Under the FPA, States routinely direct utilities to procure electricity or capacity under long- or short-term contracts. Although the resulting contracts include rates, it is not *the State*, but the competitive procurement, and winning bidder, that "sets" those rates. 14-623 Pet.-27-29; 14-623 Reply-3-5; 14-634 Pet.-24-27; 14-634 Reply-3-5.

C. The government's alternative approach – field preemption by "price suppression" – is equally inconsistent with the FPA, *Oneok*, and FERC's own views, and bears no relationship to the facts of these cases.

Even before *Oneok*, the Third Circuit rejected the government's theory as untenable and overbroad. "When a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid." 14-634 Pet. App.-29a (citing *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 514 (1989)). The addition of any new supply reduces (or, to use the government's pejorative, "suppresses") prices. The "law" implicated by that fact is the "law of supply-and-

demand." *Id.* The government's theory is even less defensible *after Oneok*, which confirms that an effect on federal markets is not a basis for *field* preemption where States target responsibilities reserved to them by Congress. See *Oneok*, 135 S.Ct. at 1600.

Equally important, the government's allusions to market "distort[ion]" are diametrically opposite FERC's own determination, as regulator of those markets, that there was no distortion. The government's litigation-driven assertions cannot override the formally adopted, and fully-supported, view of the responsible federal agency.

As explained more fully *infra*, and in the Petitions, FERC rejected petitions to exclude these power plants from the capacity auction because it determined that their bids did not distort that auction or its resulting price signals. FERC squarely held that so long as their bids satisfied FERC's rigorous minimum offer price rules, those bids do "*not artificially suppress market prices.*" *PJM Interconnection, L.L.C.*, 135 FERC ¶61,022 at P 175 (2011). (emphasis added). In an Administrative Procedure Act review proceeding, the Third Circuit affirmed FERC's decision as "*prevent[ing] the state's choices from adversely affecting wholesale capacity rates.*" *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 98 (3d Cir. 2014) *("NJBPU")* (emphasis added).

Indeed, even if the government's field preemption theory survived *Oneok*, and even if FERC had not already rejected the government's assertions about distortion, the government's allusion to possible "distortion" from below-cost bidding is irrelevant. As the government knows, the generators selected under the States' programs,

Petitioners here, bid into the PJM capacity auction on a FERC-approved cost basis, excluding any subsidy provided by the State. The questions presented by the Petitions, and the facts of these cases, involve no issue of below-cost bidding.

I. The Theories Of The Courts Below, And Of The Government, Are Untenable After *Oneok*

A. The Decisions Below Cannot Be Sustained On Their Own Rationale

The Third and Fourth Circuit's rulings were wrong before *Oneok*. *Oneok* confirms their error.

In *Oneok*, the Court reaffirmed the importance of the States' reserved powers within the framework of shared federal-state authority over energy regulation. The FPA, like the NGA, "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Oneok*, 135 S.Ct. at 1599, 1601 (internal quotation marks omitted). Thus, the fact that state laws aimed at a proper state purpose *affect* the federal field cannot be the basis for field preemption; such effects are inevitable. *Nw. Cent.*, 489 U.S. at 512-14; *Oneok*, 135 S. Ct. at 1600-01.

Oneok thus sets forth a straightforward test for field preemption: If a state program "targets" or "aims" within the State's own jurisdictional field, rather than FERC's, it is not field preempted, even if it impacts the federal field. *Oneok*, 135 S. Ct. at 1599-1601. Because the New Jersey and Maryland programs target procurement of new generation capacity, the purchasing decisions of their utilities, and retail rates, they aim squarely at the state side

of the FPA's "'dividing line.'" *Id.* at 1600 (quoting *Nw. Cent.*, 489 U.S. at 514).

Congress expressly preserved *state* authority over "facilities used for the generation of electric energy or over facilities used in local distribution ...." 16 U.S.C. §824(b). In addition to "authority over utility generation," Congress preserved state power over "utility buy-side and demand-side decisions." *New York v. FERC*, 535 U.S. 1, 24 (2002) (internal quotation marks omitted). Congress thus allowed States "to direct the planning and resource decisions of utilities under their jurisdiction." *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (internal quotation marks omitted). This includes the power to "order utilities to purchase" certain types of generation, and finance that generation through retail rates and otherwise. See *id.* (internal quotation marks omitted).

The Maryland and New Jersey programs aimed at securing and financing construction of new power plants to ensure reliable electricity supplies for the States' citizens. 14-634 Pet. App.-16a. ("LCAPP aimed to encourage power generation companies to construct new power plants...."). Their programs were implemented by directing the States' public utilities to conduct procurements and pay the winning bidders their bid prices, subject to recovery from retail ratepayers. All are matters solidly within the States' authority.

The procurements were also designed not to intrude on the federal field. Successful bidders were required to comply fully with PJM's market rules, including bidding rules, and the PJM "must offer"

rule, *i.e.*, the requirement that all capacity resources bid into the capacity auction.

The government cannot reconcile *Oneok* with these cases. It notes that the States were dissatisfied because the capacity auction had not prompted needed power plant construction, and argues that the States' procurements thereby took "direct aim at the PJM capacity market by attempting to implement their own regulatory frameworks for incentivizing new generation as a direct overlay on the PJM auction." U.S. Br.-17-18.

The government's argument turns the FPA's division of state-federal responsibility upside down. The FPA assigns authority over power plant construction *to States*. 16 U.S.C. §824(b). FERC has, at best, only an indirect role in supporting new generation through rate and market regulation. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481-82 (D.C. Cir. 2009) *("CDPUC")* (authorizing FERC to regulate a futures market to incentivize new generation, but stressing that States remain at liberty to act independently); see *ISO New England, Inc.*, 122 FERC ¶61,144 at PP 14, 16 (2008) ("[S]ection 201 [of the FPA] puts limits on the Commission's jurisdiction as it relates to electrical generating capacity"; "*how* those resources are provided is up to the [load serving entities] and the states" utilizing mechanisms such as "contracts to purchase power") (emphasis in original).

Markets are "less than perfect." *Oneok*, 135 S. Ct. at 1597. And under the FPA, governmental authority to intervene directly to promote new power plant construction when *existing* markets alone have failed to do so, necessarily resides with *States*. See

Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983) ("Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States."). Congress denied FERC authority to direct new generation. *CDPUC*, 569 F.3d at 481-82. The government's argument that FERC's *indirect* role in encouraging power plant construction field preempts the States' *direct* role turns the FPA on its head. It also directly contradicts *Oneok*'s holding that so long as the State targets proper state objectives, field preemption cannot be found.

The government's further argument – that these state programs are preempted because they provide incentives beyond those provided by PJM's yearly auction prices – would make sense only if PJM's auction were the exclusive means of selling capacity, or encouraging new power plant construction. But that is simply untrue, and the government does not assert that to be the case. There is not the remotest support for any Congressional or FERC intention to designate that auction as the sole market for capacity sales,[2] or as the sole source of incentives for building new power plants, thereby displacing state governments from exercising their historic power over power plant construction.

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[2] Capacity is routinely sold outside the auction. "Generators, as well as utilities that have purchased capacity from generators under long-term bilateral contracts" – meaning outside the auction – then resell that capacity in the PJM auction. U.S. Br.-5-6.

B. The Government's Price Suppression Theory Of "Field Preemption" Is Untenable Legally; Inconsistent With FERC's Rulings As Regulator; And Rests On Factual Suppositions Contrary To The Record

The government rehashes the position it took as *amicus* in the Third Circuit, arguing that the price *effect* of the state programs (combined with FERC's decision to allow these power plants to offer capacity into the PJM auction) provides a basis for field preemption because of the "suppressive" impact on PJM auction prices. The only difference between the government's Third Circuit argument and here is that, instead of asserting that the States' programs are preempted because they "affect" the PJM auction, the government substitutes the more pejorative verbs "suppress," "distort," "disrupt[]," and "interfere." U.S. Br.-13, 15, 16, 17. In the context of *field* preemption, however, the new words add nothing. They are just another way of saying that the State's initiatives will affect the PJM market by reducing prices in some way.

Words like "distort[ion]," "disrupt[ion]," and "interference" are more commonly used to support a *conflict* preemption argument, rather than a field preemption argument.[3] But the government makes

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[3] As demonstrated in the Reply in No. 14-623, the Fourth Circuit's alternative reliance on "conflict preemption" was makeweight, at best – an echo of mistakes underlying its field preemption rationale. 14-623 Reply-6-10. Any claim of frustration of federal purpose is irreconcilable with the fact that FERC, with full power to protect the PJM auction,

(continued...)

no conflict preemption argument because that would require it to show impairment of a federal purpose. 14-623 Pet.-29-30; 14-623 Reply-9-10; 14-634 Reply-9-10. Any conflict preemption argument is precluded by the fact that (a) FERC has the power to ensure that state initiatives like these have no adverse impact on PJM's auction, and (b) FERC exercised that power here.

Whether under the guise of field or conflict preemption, the government's ostensible concerns about "distort[ion]" or "disrupt[ion]" of the PJM auction are directly contrary to FERC's own rulings as the auction regulator. As the Third Circuit summarized, FERC's rules *prevent* the State programs at issue here "from adversely affecting wholesale capacity rates." *NJBPU*, 744 F.3d at 98.

FERC *held* that its minimum offer price rules, designed to eliminate below-cost bidding, prevented these state programs from "disrupting ... competitive price signals" emanating from the auction. *PJM Interconnection, L.L.C.*, 137 FERC ¶61,145 at PP 3-4 (2011). FERC held that a bidder whose bid clears the auction under those rules is "a competitive resource and should be permitted to participate in the auction regardless of whether it also receives a subsidy." 135 FERC at P 177. Any contrary approach would "discourage the entry of new capacity that is economic." *Id.* at P 175. Moreover, FERC determined that there was no need for further

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(continued...)
specifically determined that these state procurements posed no threat to that auction.

restrictions because once a bid has cleared the auction, "the resource has demonstrated that it is needed by the market and ... [its] *presence in the market ... does not artificially suppress market prices.*" *Id.* (emphasis added).

As the Third Circuit observed, the effect on auction prices here is an increased supply causing price reduction – the "law of supply-and-demand." 14-634 Pet. App.-29a. There is a difference between price "suppression" from added supply, which FERC obviously does not find objectionable, and "artificial price suppression," from below cost-bidding, which FERC ensured would not occur here under its minimum offer price rules.

Although Petitioners in this case submitted cost-based bids into the auction, the government nonetheless alludes to potential price suppression from below-cost bidding. It observes that FERC's minimum offer price rules, which generally bar below-cost bidding, could, *in theory*, allow a bidder to bid a "minimum-offer *default price* – even if the generator's actual costs are higher than the default price." U.S. Br.-16 (emphasis added). None of this happened here, of course, and that hypothetical argument is, at its core, a collateral attack on FERC's decision to allow that theoretical – but, as a practical matter, unlikely[4] – possibility to exist under its rules.

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[4] It is unlikely because if the "default price" is set high, an offer at that default price (a) will not clear (and thus does not affect) the auction price, and (b) is not likely to be below any offeror's costs.

The government does *not* suggest that a "default price," or "below-cost" bidding, had any role in these cases. Petitioners, the winning generators under the New Jersey and Maryland programs, did not bid either a "default" or "below-cost" price. To the contrary, in accordance with FERC's minimum offer price rules, they offered their capacity into the auction at thoroughly documented, cost-based prices, irrespective of any subsidy.[5] PJM reviewed the bids to ensure that they were not below cost, and the final auction price was approved by FERC. There was no below-cost bidding. Thus, the government's allusion to below-cost bidding potentially affecting prices is legally irrelevant as a matter of field preemption, inconsistent with FERC's determination to allow bids that comply with its minimum offer price rules, and factually irrelevant to the questions actually presented by the Petitions.

II. The Government's Attempt To Downplay The Impact Of These Cases Falls Flat

The decisions below nullify two States' efforts to meet their citizens' electricity needs by investing in three major natural gas power plants, each costing more than a half-billion dollars. As reflected in the briefs of many *amici*, the decisions by their terms undermine a basic method by which States finance major power plant and alternative energy projects. And the pall of uncertainty created by those decisions has already been felt in the suspension of

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[5] See, *e.g.*, 14-623 Pet. App.-94a (explaining that CPV's bid was cost-justified).

projects supported by long-term contracts even in other Circuits.[6] No prudent investor or lender will make billion dollar investments in needed infrastructure projects whose revenues are subject to being stripped away under a preemption theory.

The government insists that the displacement of state authority wrought by these decisions will ultimately be narrow because the opinions declare themselves narrow. The government suggests that other state subsidies, like tax breaks, or tax-supported bonds, might survive judicial review. But by off-setting costs, all such subsidies would have the same "suppressive" effect on prices.

Reliable, long-term revenue streams, backed by local ratepayers, have always been a key incentive to power plant investment.[7] The decisions below threaten the ability of the States to ensure those revenue streams, and thus to support needed power plant construction. Until the decisions below, the mechanism declared unlawful here had proven effective in encouraging new power plants to be built, and had done so in a manner that is

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[6] For example, New York recently approved a long-term contract designed to provide the revenue needed to keep a needed coal-operated plant from being mothballed. In the face of a preemption challenge, the plant operator suspended development. See "NRG To Close Huntley Coal-Fired Plant," *Megawatt Daily* at 13 (Aug. 26, 2015) ("We can't continue to invest in the plant under such massive uncertainty.").

[7] More than 97% of all power plant construction is supported by long-term ratepayer commitments. See American Public Power Association, *Power Plants Are Not Built on Spec*—2014 Update at 1-2 and Table 1 (2014), http://goo.gl/t62QuS.

economically efficient. States and their retail ratepayers pay precisely what is required to get needed new generation built, namely, the difference between the revenues needed to support private investment in a new power plant, and the revenue the plant obtains by selling capacity in the interstate market. Other forms of subsidy, fashioned without reference to revenues earned by selling capacity in the interstate market – such as tax breaks – may be too great (wasting taxpayer money) or too small (failing to encourage development). The decisions below improperly divest the States of their ability to support important projects, and do so in a manner fundamentally inconsistent with the States' responsibilities under the FPA.

CONCLUSION

The Petitions should be granted.

Respectfully submitted.

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